150. 157. 166. 189.
June 98. 79 Cyc
8 — 381
Oct. 3. 1878.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 150.

THE UNITED STATES EX REL. MORRIS RANGER, PLAINTIFF IN ERROR,

vs.

THE CITY OF NEW ORLEANS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

FILED SEPTEMBER 18, 1876.

SUPREME COURT OF THE UNITED STATES.

No. 150.

THE UNITED STATES EX REL. MORRIS RANGER, PLAINTIFF IN ERROR,

vs.

THE CITY OF NEW ORLEANS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

INDEX.

	Original.	Print.
Petition and order thereon	1	1
Marshal's return	6	3
Judgment referred to in the petition	7	3
Judgment referred to in the petition	8	3
Judgment referred to in the petition	9	4
Writ of fieri facias referred to in the petition	10	4
Marshal's return thereon	11	5
Writ of fieri facias referred to in the petition	12	5
Marshal's return thereon	14	6
Writ of fieri facias referred to in the petition	14	6
Marshal's return thereon	16	6
Notice of application for writ of mandamus	17	7
Marshal's return thereon	17	7
Answer	18	8
Hearing and submission of application	22	9
Order for reargument of application	22	9
Reargument and submission of application	23	10
Demurrer to the answer	23	10
Judgment	24	10
Rule and grounds for a new trial	25	11
Order, new trial refused	27	11
Final judgment	27	12
Petition and order for writ of error	28	12
Bond for writ of error	29	12
Clerk's certificate	32	13
Writ of error	33	14
Citation	34	14

1 UNITED STATES OF AMERICA.

Circuit court of the United States, fifth circuit, and district of Louisiana.

THE UNITED STATES OF AMERICA ON THE relation of Morris Ranger *versus* THE CITY OF NEW ORLEANS. } No. 7827.

To the honorable the circuit court of the United States for the district of Louisiana:

The petition of the United States of America on the relation of Morris Ranger, of Liverpool, England, an alien, and subject of the Queen of Great Britain & Ireland, respectfully shows, that your relator has heretofore recovered judgment at law in this honorable court in suits Nos. 7401, 7444, and 7593 of the docket against the city of New Orleans, a body corporate under the laws of Louisiana, on certain bonds and coupons issued by said city under the provisions of acts No. 108 and 109 of the legislature of the State of Louisiana of the 15th of March, 1854, amounting in the aggregate to fifty-nine thousand nine hundred and sixty dollars, with six per cent. interest per annum on eighteen thousand
2 dollars from the 1st of May, 1874; on eight thousand dollars from the 1st of September, 1874; on sixteen thousand dollars from the 1st of January, 1875; on five thousand dollars from the 1st of March, 1875; and on twelve thousand dollars from the 1st of April, 1875; and five per cent. interest per annum on four hundred and fifty dollars from the 1st of January, 1875; on three hundred and sixty dollars from the 1st of April, 1875; and on one hundred and fifty dollars, and for all costs.

And your petitioner shows that under said judgment he has caused writs of fieri facias to issue against said city, and that the same have been returned nolla bona after due demand upon the officers of said city to point out property to be levied upon under said writs to satisfy the same. That there is no property out of which said judgment can be made belonging to the said defendant that is subject to seisure under execution, and that relator cannot make his money except through the writ of mandamus to be issued to the proper authorities of said city by this honorable court.

Your relator says that on the 20th June, 1870, the said city sold to H. S. McComb eighty thousand shares of stock held by it of the
3 New Orleans, Jackson and Great Northern Railroad Company for the sum of three hundred and twenty thousand dollars, and that by the terms of said act No. 109 of 1854 the said shares of stock were forever pledged for the payment of the bonds issued by said city under the provisions of said act No. 109; and your relator respectfully represents that the said city should be compelled by mandamus from this honorable court to pay so much of said judgments in favor of relator against said city as appears from the face of the record in said suits to have been rendered upon bonds and coupons of said city issued under the provisions of said act No. 109 of 1854 out of the proceeds of the sale of said railroad stock; and that in the event that the payment of the judgments upon said bonds and coupons cannot be enforced in this way, that then the said city should be compelled by writ of mandamus to levy and collect within a reasonable delay, to be limited by the court, a sufficient tax to pay said judgments; and that by similar writ the said city should be compelled to levy and collect within a reasonable time,

to be limited by the court, a sufficient tax to pay so much of said
4 judgment as appear to have been rendered upon bonds and coupons of said city issued under the provisions of said act No. 108 of 1854; that mayor and administrators who represent and exercise the corporate powers of the said city of New Orleans refuse to pay said judgments out of any funds in their possession or under their control, or to levy and collect any tax to pay said judgments of relator and put at defiance, and that he is entirely without remedy to collect said judgments by ordinary levy of execution upon the property of said corporation; that the mayor of said city is Charles J. Leeds, and the administrators are Edward Pilsbury, administrator of finance; James G. Brown, administrator of public accounts; Leon Bertoli, administrator of water-works and public buildings; Dennis McCarthy, administrator of police; J. O. Landry, administrator of commerce; P. L. Bouny, administrator of asses'ments; and E. A. Burke, administrator of improvements, who are now in the possession of their offices and in full exercise of the powers thereof.

Wherefore petitioner prays that, the premises and accompanying affidavit being considered, your honor will order the said mayor and administrators of said city to show cause, on a day to be assigned
5 by the court, why a peremptory writ of mandamus should not issue herein commanding them, within a reasonable delay, to be determined by the court, to pay out of the proceeds of eighty thousand shares of the New Orleans, Jackson and Great Northern Railroad Company, sold by said city on June 20, 1870, to H. S. McComb, so much of said judgments in favor of your relator as appears on the face of the records to have been rendered upon bonds and coupons of said city issued under the provisions of said act No. 109 of 1854, or, in the event that the said city cannot be compelled to pay the portions of said judgments recovered upon said bonds and coupons issued under said act No. 109 in that way, that the said mayor and administrators be commanded to levy and collect, within a reasonable time, to be limited by the court, a sufficient tax to pay said portions of said judgments, and that they may be commanded in like manner to levy and collect a sufficient tax to pay so much said judgments as are for bonds and coupons issued under said act No. 108 of 1854, and all costs, and that said taxes, when collected, be set apart and paid to your relator in
6 satisfaction of said judgments; and relator prays for costs and for general relief.

(Signed) HENRY B. KELLY.
" LABATT, ARONI & CLINTON,

Louis Ranger, being sworn, says that he is the agent and attorney in fact of Morris Ranger, the relator, for the purpose of this suit, and the averments of the *following* petition are true.

(Signed) LOUIS RANGER.

Sworn to and subscribed before me this 3rd day of April, 1876.

(Signed) F. B. VINOT,
U. S. Comm's'r.

Let the mayor and administrators of the city of New Orleans show cause on Saturday, the 15th April, 1876, at 11 a. m., why a writ of mandamus should not issue herein as prayed for.

(Signed) W. B. WOODS,
U. S. Judge.

Marshal's return.

Received April 4th, 1876, by the U. S. marshal, and on the same day, month, and year served a copy hereof on Mayor C. J. Leeds by handing the same to him in person in this city.

(Signed) S. B. PACKARD,
U. S. Marshal.
By C. R. STEELE,
Deputy.

7 *Judgments referred to in the petition.*

Circuit court of the United States, fifth circuit, and district of Louisiana, November term, 1875.

NEW ORLEANS, *Wednesday, February 9th*, 1876.

Court met pursuant to adjournment.
Present, Hon. W. B. Woods, circuit judge.

MORRIS RANGER
vs.
CITY OF NEW ORLEANS. } No. 7401.

By reason of the verdict, and in accordance therewith, it is ordered, adjudged, and decreed that the plaintiff, Morris Ranger, do have and recover from the city of New Orleans, a corporation duly established under the laws of the State of Louisiana, the sum of seventeen thousand two hundred and seventy dollars, with six per cent. interest on nine thousand dollars from 1st January, 1875, till paid; like interest on eight thousand dollars from 1st September, 1874, till paid, and five per centum interest on two hundred and seventy dollars from 1st January, 1875, till paid, and costs of suit.

Judgment rendered February 9th, 1876.
Judgment signed February 15th, 1876.

8 (Signed) W. B. WOODS, *Judge.*

Circuit court of the United States, fifth circuit, and district of Louisiana, November term, 1875.

NEW ORLEANS, *Wednesday, February* 9th, 1876.

Court met pursuant to adjournment.
Present, Hon. W. B. Woods, circuit judge.

MORRIS RANGER
vs.
CITY OF NEW ORLEANS. } No. 7444.

By reason of the verdict, and in accordance therewith, it is ordered, adjudged, and decreed that the plaintiff, Morris Ranger, do have and recover from the city of New Orleans, a municipal corporation domiciled in the parish of Orleans, the sum of thirty-two thousand dollars, with six per centum interest on eighteen thousand dollars from May 1st, 1874, till paid; like interest on seven thousand dollars from January 1st, 1875; and like rate of interest on seven thousand dollars from April 1st, 1875, till paid, and costs of suit.

Judgment rendered February 9th, 1876.
Judgment signed February 15th, 1876.

(Signed) W. B. WOODS, *Judge.*

9 Circuit court of the United States, fifth circuit, and district of Louisiana. November term, 1875.

NEW ORLEANS,
Wednesday, February 9, 1876.

Court met pursuant to adjournment.
Present, Hon. W. B. Woods, circuit judge.

MORRIS RANGER
vs.
CITY OF NEW ORLEANS. } No. 7593.

By reason of the verdict and in accordance therewith, it is ordered, adjudged, and decreed that the plaintiff, Morris Ranger, do have and recover from the city of New Orleans, a municipal corporation domiciled in the parish of Orleans, the sum of ten thousand six hundred and ninety dollars, with six per centum interest on five thousand dollars from March 1st, 1875; like rate of interest on five thousand dollars from April 1st, 1875, and five per centum interest on three hundred and sixty dollars from April 1st, 1875; like interest on one hundred and eighty dollars from January 1st, 1875; and like interest on one hundred and fifty dollars from March 5th, 1875, until paid, and costs of suit.

Judgment rendered February 9th, 1876.
10 Judgment signed February 15th, 1876.
(Signed) W. B. WOODS, *Judge.*

Writ of fieri facias referred to in the petition issued March 6, 1876; *returned & filed May* 13, 1876.

MORRIS RANGER
vs.
CITY OF NEW ORLEANS. } No. 7401. Alias fi. fa.

UNITED STATES OF AMERICA:

Circuit court of the United States for the fifth circuit, holding sessions in and for the district of Louisiana.

The President of the United States to the marshal of the district of Louisiana, or his lawful deputy, greeting:

You are hereby commanded that you demand from the city of New Orleans the sum of seventeen thousand two hundred and seventy dollars, with six per centum interest on $9,000 from 1st January, 1875, till paid; like interest on $8,000 from 1st September, 1874, till paid, and five per centum interest on $270 from 1st January, 1875, till paid, and costs of suit—clerk's costs, $27.40; att'y's fee, $20, cash—which
11 Morris Ranger lately recovered by judgment of the circuit court of the United States for the fifth circuit, and district of Louisiana; and if the same be not paid on demand, that you cause the same to be made out of the personal estate of the said city of New Orleans in your district, if sufficient personal estate can be found therein; but if sufficient personal estate cannot be found in your district, that then you cause the same to be made out of the real estate of the said city of New Orleans; and that you have those moneys before our said court to render to the said Morris Ranger for the judgment aforesaid on the 70th day from the date hereof, together with this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 6th day of March, A. D. 1876, and 100th year of the Independence of the United States.

(Signed) F. B. VINOT, *Dy Clk.*

Marshal's return.

Received March 6, 1876, by the U. S. marshal, and on the 13th
12 day of March, 1876, I made demand on the city of New Orleans, through the mayor, C. J. Leeds, def't, for the payment of the within amount of judgment, interest, and costs, who answered that he had no money or property wherewith to satisfy the same; and no property being pointed out by pl't'ff, and being unable to find money or property to satisfy this writ, and the day allowed by law having expired, I return this writ not satisfied.

May 13, '76.

(Signed) S. B. PACKARD,
U. S. Marshal.
By C. R. STEELE,
Deputy.

Writ of fieri facias referred to in the petition; issued March 6, 1876; *returned & filed May* 13, 1876.

MORRIS RANGER
vs.
CITY OF NEW ORLEANS. } No. 7444. Alias fi. fa.

UNITED STATES OF AMERICA:

Circuit court of the United States for the fifth circuit, holding sessions in and for the district of Louisiana.

The President of the United States to the marshal of the district of Louisiana, or his lawful deputy, greeting:

You are hereby commanded that you demand from the city
13 of New Orleans the sum of thirty-two thousand dollars, with six per centum interest on $18,000 from May 1st, 1874, till paid; like interest on $7,000 from January 1st, 1875, and like interest on $7,000, from April 1st, 1875, till paid, and costs of suit—clerk's costs, $27.20; att'y's fee, $20—cash, which Morris Ranger lately recovered by judgment of the circuit court of the United States for the fifth circuit, and district of Louisiana; and if the same be not paid on demand, that then you cause the same to be made out of the personal estate of the said city of New Orleans in your district, if sufficient personal estate can be found therein; but if sufficient personal estate cannot be found in your district, that then you cause the same to be made out of the real estate of the said city of New Orleans in your district; and that you have those moneys before our said court to render to the said Morris Ranger for the judgment aforesaid on the 70th day from the date hereof, together with this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 6th day of March, A. D.
14 1876, and 100 year of the Independence of the United States.

[SEAL.] (Signed) F. B. VINOT,
Dy Clk.

Marshal's return.

Received March 6th, 1876, by the U. S. marshal, and on the 13th day of March, 1876, I made demand on the city of New Orleans, through the mayor, C. J. Leeds, def't, for the payment of the within amount of judgment, interest and costs, who answered that he had no money or property wherewith to satisfy the same; and no property being pointed out by pl'ff, and being unable to find money or property to satisfy this writ, and the delay allowed by law having expired, I return this writ not satisfied.

May 13th, 1876.

(Signed) S. B. PACKARD,
U. S. Marshal,
By C. R. STEELE,
Deputy.

Writ of fieri facias referred to in the petition issued March 6th, 1876, returned & filed May 13th, 1876.

MORRIS RANGER
vs.
CITY OF NEW ORLEANS. } No. 7593 alias fi. fa.

UNITED STATES OF AMERICA:

15. Circuit court of the United States for the fifth circuit, holding sessions in and for the district of Louisiana.

The President of the United States to the marshal of the district of Louisiana, or his lawful deputy, greeting:

You are hereby commanded that you demand from the city of New Orleans the sum of ten thousand six hundred and ninety dollars, with six per centum interest on $5,000 from April 1st, 1875, and five per centum interest on three hundred and sixty dollars from April 1st, 1875; like interest on $180 *dollars* from January 1st, 1875, and like interest on $150 from March 5, 1875, until paid, and costs of suit—clerk's costs, $25.10; att'y's fee, $20—cash, which Morris Ranger lately recovered by judgment of the circuit court of the United States for the fifth circuit and district of Louisiana; and if the same be not paid on demand that then you cause the same to be made out of the personal estate of the said city of New Orleans in your district, if sufficient personal estate can be found therein; but if sufficient personal estate cannot be found in your district that then you cause the same to be made out of the real estate of the said city of New Orleans in your district, and
16 that you have those moneys before our said court to render to the said Morris Ranger for the judgment aforesaid on the 70th day from the date hereof, together with this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 6th day of March, A. D. 1876, and 100th year of the Independence of the United States.

[SEAL.] (Signed) F. B. VINOT,
D'y Clk.

Marshal's return.

Received March 6th, 1876, by the U. S. marshal, and on the 13th day of March, 1876, I made demand on the city of New Orleans, through the mayor, C. J. Leeds, def't, for the payment of the within amount of

judgment, interest, & costs, who answered that he had no money or property wherewith to satisfy the same, and no property being pointed out by pl't'ff, and being unable to find money or property to satisfy this writ, and the delay allowed by law having expired, I return this writ not satisfied.

May 13th, 1876.

(Signed) S. B. PACKARD,
U. S. Marshal,
By C. R. STEELE,
Deputy.

17 *Notice of application for writ of mandamus, issued, returned, & filed April 4th, 1876.*

Circuit court of the United States, fifth circuit, and district of Louisiana.

CLERK'S OFFICE, *New Orleans, April 3d,* 1876.

THE UNITED STATES, EX RELATOR, *vs.* THE CITY OF NEW ORLEANS. } No. 7827.

To Edward Pilsbury, administrator of finance; James G. Brown, administrator of public accounts; Leon Bertoli, administrator of waterworks and public buildings; Dennis McCarthy, adm'n'r of police; J. O. Landry, administrator of commerce; P. L. Bouny, administrator of asses'ments, and E. A. Burke, administrator of improvements:

You are hereby notified that, upon the application for a mandamus as prayed for in the above entitled cause, the court has given the following order: Let the mayor and administrators of city of New Orleans show cause, on Saturday, the 15th April, 1876, at 11 a. m., why a writ of mandamus should not issue herein as prayed for.

(Signed) W. B WOODS, *Judge.*

Attest:

[SEAL.] April. F. B. VINOT, *D'y C'k.*

Marshal's return.

18 Received April 4th, 1876, by the U. S. marshal, and on the same day, month, and year, served a copy hereof, on the within, as follows:

Edward Pilsbury, p'lly.
Ja's G. Brow, "
Leon Bertoli, "
Dennis McCarthy, "
J. O. Landry, "
P. L. Bouny, "
E. A. Burke, "

(Signed) S. B. PACKARD,
U. S. Marshal,
By S. W. REED,
Deputy.

Answer.—Filed April 19th, 1876.

U. S. circuit court.

THE UNITED STATES OF AMERICA, ON THE relation of Morris Ranger,
vs.
CHARLES J. LEEDS, MAYOR OF THE CITY of New Orleans, James G. Brown, Edward Pilsbury, Leon Bertoli, Denis McCarthy, J. O. Landry, P. L. Bouny, and E. A. Burke, administrators, respectively, of accounts, of finance, of water-works, of police, of commerce, of asses'ments, and of improvements. } No.

And for answer to the petition of the relator, Morris Ranger, they allege and show, that they admit the said relator has recovered judgment against the city of New Orleans; that an execution has issued
19 and returned, no property found, as more fully appears by reference to the judgment, execution, and return thereon, in the suit of Morris Ranger vs. The City of New Orleans, No. of the docket of this court, specially referred to, for fuller explanation and greater certainty.

And further answering, the respondents say that said judgment was recovered upon certain bonds and for the principal thereof, made by the city of New Orleans for one thousand dollars each, issued by the said city to the New Orleans, Jackson and Great Northern Railroad Co., under the authority of the act of the legislature of Louisiana, No. 109, approved March 15th, 1854, as appears by said record.

And further answering, these respondents say that no tax whatever for the payment of the principal of said bonds is directed to be levied or collected by the said act or by any other act of the legislature or provision of law; and these respondents refer to said act, and especially to the 2nd section thereof, to show the absence of such provision; and these respondents show that so far as respects the interest upon the bonds of the city required to be provided for, such interest is provided to
20 be paid out of the back taxes due the city of New Orleans, and such provision is stated in the budget of said city for 1876.

Forasmuch, therefore, as the laws of Louisiana have directed no tax to be levied or collected to pay the principal of said bonds, these respondents are wholly without authority to levy & collect said tax, & have no duty to perform in the premises, & this honorable court is without authority to grant the writ of mandamus prayed for.

These respondents admit that on the 20th June, 1870, the authorities of the city of New Orleans did have a transaction with H. S. McComb, by which they undertook to sell to him certain eighty thousand shares of the capital stock of the New Orleans, Jackson and Great Northern Railroad Company for the sum of three hundred and twenty thousand ($320,000) dollars, which said authorities received. These respondents aver that no part of said proceeds of said so-called sale is now in the treasury of the city or in possession or under the control of these respondents; that the said proceeds have long since been used and expended and no portion thereof ever came into the possession or control of these respondents, the present authorities of said city. These re-
21 spondents show that no writ of mandamus can issue to compel the payment of the relator's demand out of said proceeds, because said proceeds are not in existence; and these respondents deny that any

duty or obligation is imposed on them by reason of or arising out of such transaction, or that, in respect to the subject, this court has any authority to issue a writ of mandamus.

Wherefore these respondents pray for judgment in their favor, that the petition of relator be dismissed with costs, and for general relief.

(Signed) FINNEY & MILLER,
" B. F. JONAS,
Att'y for Respond'ts.

Charles J. Leeds, Mayor of the city of New Orleans, Edward Pilsbury, James G. Brown, Leon Bertoli, Denis McCarthy, J. O. Landry, P. L. Bouny, and E. A. Burke, administrators, respectively, of finance, of accounts, of water-works, of police, of commerce, and of improvements, being duly sworn, depose and say that all the facts and allegations in the foregoing petition contained are true and correct.

(Signed.) ED. PILSBURY, *Ad. F.*
" J. O. LANDRY,
Adm. of Commerce.
" J. G. BROWN,
Adm'r of Accounts.

22 Sworn to and subscribed before me this 19th day of April, A. D. 1876.

[SEAL.] (Signed) W. T. HOUSTON,
First Justice of the Peace.

Hearing and submission of application.—Extract from the minutes, April 19, 1876.

NEW ORLEANS, *Wednesday, April* 19, 1876.

Court met pursuant to adjournment.
Present, Hon. E. C. Billings, district judge.

U. S. RELATION MORRIS RANGER
vs.
CITY OF NEW ORLEANS. } No. 7827.

The application for a writ of mandamus in the above cause was called for hearing.

Messrs. Semmes & Mott, Clarke, Bayne & Renshaw, Labatt, Aroni & Clinton, & H. B. Kelly for relator. B. F. Jonas & Finney & Miller, for defendants.

And after hearing the pleadings and argument the court took time to advise.

Order for reargument of application.—Extract from the minutes, April 29, 1876.

U. S. EX RELATION MORRIS RANGER
vs.
CITY OF NEW ORLEANS. } No. 7827.

23 Ordered that a reargument be had in the above case on Wednesday, May 3d, 1876, at 11 a. m., counsel, being present, taking notice hereof.

Reargument & submission of application—Extract from minutes, May 3d, 1876.

U. S. EX RELATION MORRIS RANGER
vs.
CITY OF NEW ORLEANS. } No. 7827.

After hearing further argument by Messrs. Semmes & Mott, Thos Allen Clarke, Labatt, Aroni & Clinton, Henry C. Miller, and B. F Jonas, the court took time to advise.

Demurrer to the answer.—Filed May 6, 1876.

Circuit court of the United States, district of Louisiana.

THE UNITED STATES ON THE RELATION OF
Morris Ranger
vs.
CITY OF NEW ORLEANS. } No. 7827.

The demurrer of the United States of America on the relation of Morris Ranger, plaintiff, to the answer of the city of New Orleans, the above named defendant.

This plaintiff by protestation not confessing all or any of the
24 matters and things in the defendant's answer contained to be true in such manner and form as the same is therein set forth and alleged, doth demur to said answer, and for cause of demur'er showeth that the defendant has not made or stated such a defence as to defeat or prevent the right to a mandamus claimed by the plaintiff, and plaintiff hereby prays that the judgment of the court as to the answer they have so demur'ed to as aforesaid, and that said answer be rejected, and that plaintiff have his proper costs and charges.

(Signed) LABATT, ARONI & CLINTON,
Of Counsel.

We certify that in our opinion the foregoing demur'er is well founded in law.

(Signed) LABATT, ARIONI & CLINTON,
Of Counsel.

Judgment.—Extract from the minutes of May 8, 1876.

UNITED STATES EX RELATION MORRIS RANGER
vs.
CITY OF NEW ORLEANS. } No. 7827.

This cause came on to be heard upon the application for a writ of mandamus and was argued by counsel. On consideration whereof it is ordered by the court that complainants' demur'er to the answer
25 be overruled and that a writ of mandamus be refused with costs.

Rule and grounds for a new trial.—Extract from the minutes, and filed May 10th, 1876.

United States circuit court, district of Louisiana.

THE UNITED STATES EX REL. MORRIS RANGER
vs.
CITY OF NEW ORLEANS. } No.

On motion of Labatt, Aroni & Clinton, of counsel for relator, and in suggesting to the court that the judgment herein rendered is clearly contrary to law and the evidence, for the reasons:

First. Because the judgment admits the relator's right to a mandamus to compel the City of New Orleans to levy and collect a special tax to satisfy relator's judgment, obtained for principal and interest of matured bonds of said city, if there is a provision in the statute under which the bonds were issued, or in any other statute of this State, for the levying and collection of this tax, and declares that no such statute is in existence; whilst, to the contrary, act No. 108, of 1854, clearly makes it the duty of the city authorities to levy and collect the interest annually, which interest continues to run after maturity of the bonds, and must be provided for by annual taxation, to which extent relator is clearly
26 entitled to the mandamus.

Second. Because there is error in the judgment in stating that since the Legislature of the State of Louisiana has not by any general or special statute expressly or by implication made it the duty of the common council to levy this tax, this court is without any authority to direct its imposition, because there is such special legislature, if it is not found by implication in the act of 1854, above cited.

Third. Because section 15 of act No. 73, passed 26th April, 1872, in anticipation of the approaching maturity of the city bonds, whereon the relator's judgments were obtained, made it the first and permanent duty of the city council, before levying a tax for any other purpose, even for current city expenses, to levy a special tax for all bonds, for which no other retiring provision exist by law, and which tax was declared a vested right of the bondholders interested.

Fourth. Because the judgment refusing the mandamus deprives the relator of this vested right, and in all practical results deprives him of due process of law to enforce the obligation, and destroys the obligation altogether.

It is ordered that the defendant, the city of New Orleans, show cause on the 12th day of May, at 11 a. m., 1876, why a new trial of this cause shall not be granted.

27 *Order.—New trial refused.—Extract from the minutes, May 13th, 1876.*

UNITED STATES EX RELATION MORRIS RANGER
vs.
CITY OF NEW ORLEANS. } No. 7827.

For reasons orally assigned, it is ordered that the rule taken by complainant on 10th instant be dismissed, and that a new trial be refused, with costs.

Final judgment.—Extract from judgment-book, April term, 1876.

Circuit court of the United States, fifth circuit and district of Louisiana.

NEW ORLEANS, *Monday, May 8th*, 1876.

Court met pursuant to adjournment.
Present, Hon. Edward C. Billings, district judge.

UNITED STATES EX RELATION MORRIS RANGER
vs.
THE CITY OF NEW ORLEANS. } No. 7827.

This cause came on to be heard upon the application for a writ of mandamus, and was argued by counsel. On consideration whereof it is ordered by the court that complainants' demur'er to the answer be overruled, and that a writ of mandamus be refused, with costs.

Judgment rendered May 8th, 1876.
28 Judgment signed May 26, 1876.
(Signed) EDWARD C. BILLINGS,
Judge.

Petition and order for writ of error.—Filed June 1st, 1876.

To the honorable the judges of the circuit court of the United States in and for the circuit and district of Louisiana:

The petition of Morris Ranger, an alien, subject of Great Britain, respectfully shows, that in a certain suit styled "United States on the relation of Morris Ranger vs. City of New Orleans, No. 7827," on the docket of this honorable court, judgment was rendered on the 8th day of May, A. D. 1876, & signed on the 26th May, 1876, by which judgment he feels aggrieved, and from which he desires to appeal by writ of error to the Supreme Court of the United States, and that he is ready to furnish the bond required according to law.

Wherefore he prays that an order issue granting to him the writ of error, returnable to the Supreme Court of the United States, and upon his giving bond as this honorable court may direct, and for general relief; and your petitioner will ever pray.

(Signed) LABATT, ARONI & CLINTON,
Att'ys for Morris Ranger.

29 Let a writ of error issue as prayed for, returnable on or before the second Monday in October, 1876, upon petitioner giving bond according to law, with approved security in the sum of five hundred dollars.

June 1st, 1876.
(Signed) EDWARD C. BILLINGS, *Judge.*

Bond for writ of error.—Filed June 1, 1876.

United States circuit court.

UNITED STATES ON THE RELATION OF MORRIS Ranger, plaintiff in error,
vs.
CITY OF NEW ORLEANS, DEF'T IN ERROR. } No. 7827.

UNITED STATES OF AMERICA:

Know all men by these presents that we, Morris Ranger as principal, and Louis Ranger and Julius Aroni as sureties, are held and firmly

bound unto the mayor and administrators of the city of New Orleans et al. in the full and just sum of five hundred dollars, to be paid to the said mayor and administrators of the city of New Orleans, &c., or their certain attorney, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed
30 with our seals, and dated this first day of June, in the year of our Lord one thousand eight hundred and seventy-six.

Whereas lately, at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the district of Louisiana, in a suit depending in said circuit court, wherein The United States on the relation of Morris Ranger is plaintiff and the said City of New Orleans is defendant, judgment was rendered against the said relator, Morris Ranger, and the said Morris Ranger having obtained a writ of error, and filed a copy therof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and a citation directed to said mayor and administrators of the city of New Orleans citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday in October next:

Now, the condition of the above obligation is such, that if the said Morris Ranger shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in the presence of—

31 (Signed) MORRIS RANGER,
By ARONI. [L. S.]
" LOUIS RANGER. [L. S.]
" JULIUS ARONI, [L. S.]

Approved.
(Signed) EDWARD C. BILLINGS,
Judge.

32 UNITED STATES OF AMERICA:

Circuit court of the United States, fifth circuit and district of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, do hereby certify that the foregoing 31 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had on the trial of the case of The United States, on the relation of Morris Ranger versus The City of New Orleans, No. 7827 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 11th day of September, A. D. 1876.

[SEAL.] F. A. WOOLFLEY, *Clerk.*

I, Edward C. Billings, United States judge for the district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand at the city of New Orleans, in said district, this 11th day of September, A. D. 1876.

EDWARD C. BILLINGS, *Judge.*

33 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit, and holding sessions for the district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between the United States on the relation of Morris Ranger and the mayor and administrators of the city of New Orleans, a manifest error hath happened, to the great damage of the said Morris Ranger as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 1st day of June, in the *the* year of our Lord one thousand eight hundred and seventy-six.

[SEAL.] F. A. WOOLFLEY,
Clerk of the United States Circuit Court for the District of Louisiana.

(Indorsed:) United States circuit court. No. 7827. United States, on the relation of Morris Ranger, pl'ff in error, versus City of New Orleans, defendant in error. Writ of error. Filed June 1st 1876. F. B. Vinot, d'y c'l'k.

34 THE UNITED STATES OF AMERICA:

Circuit court of the United States, district of Louisiana.

The President of the United States to Charles J. Leeds, mayor of the city of New Orleans, James G. Brown, Edward Pilsbury, Leon Bertoli, Denis McCarthy, J. O. Landry, P. L. Bouny, and E. H. Burke, administrators respectively of accounts, of finance, of water-works, of police, of commerce, of assessments, and of improvements, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and district of Louisiana, wherein the United States on the relation of Morris Ranger is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 2d day of June, in the year of our Lord one thousand eight hundred and seventy-six.

EDWARD C. BILLINGS, *Judge.*

35 (Indorsed:) United States circuit court. No. 7827. United States on the relation of Morris Ranger, plaintiff in error, vs. City of New Orleans, defendant in error. Citation.

Marshal's return received Jun. 3, 1876, by the U. S. marshal, and on the 24th day of June, 1876, served a copy hereof on the city of New Orleans by handing the same to C. J. Leeds, the mayor of the city of New Orleans, in person, in this city.

S. B. PACKARD,
U. S. Marshal.
By S. W. REED,
D'y Marshal.

Received Jun. 3, 1876, by the U. S. Marshal, and on this 6th day of July, 1876, personally appeared before me S. W. Reed, the subscriber, and makes oath that he served a copy of the within citation as stated in his official return hereon.

S. W. REED,
D'y U. S. Marshal.

Subscribed and sworn to before me this 6th day of July, 1876.
F. B. VINOT,
U. S. Comm'r.

(Indorsement on cover:) No. 150. The United States ex rel. Morris Ranger, plaintiff in error, vs. The City of New Orleans. Louisiana. C. C. U. S. Filed 18th September, 1876.

SUPREME COURT

OF THE UNITED STATES,

No. 150.

THE UNITED STATES EX. REL. MORRIS RANGER, PLAINTIFF IN ERROR,

VERSUS

THE CITY OF NEW ORLEANS, DEFT. IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR DISTRICT OF LOUISIANA, HON. E. C BILLINGS, PRESIDING.

BRIEF FOR RELATOR.

LABATT, ARONI & CLINTON,

Atty's for Plaintiff.

BALTIMORE:
GUGGENHEIMER & WEIL, STATIONERS & PRINTERS,
177 WEST BALTIMORE STREET,
1878.

SUPREME COURT OF THE UNITED STATES,

No. 150.

THE UNITED STATES EX. REL. MORRIS RANGER, PLAINTIFF IN ERROR,

VERSUS

THE CITY OF NEW ORLEANS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR DISTRICT OF LOUISIANA, HON. E. C. BILLINGS, PRESIDING.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the U. S.

MAY IT PLEASE YOUR HONORS:

STATEMENT OF FACTS AND PLEADINGS.

This is a suit for a mandamus against the City of New Orleans. The relator has three judgments, obtained in suits 7401, 7444 and 7593, on certain bonds and coupons issued by said city under the provisions of Act No. 109 of the legislature of the State of Louisiana, 15 March, 1854. They amount to $59,960, with 6 per cent. in-

terest per annum on $18,000 from 1st May, 1874; on $8,000 from 1st Sept., 1874; on $16,000 from 1st Jan., 1875; on $5,000 from 1st March, 1875; and on $12,000 from 1st April, 1875; and 6 per cent. per annum on $450 from 1st Jan., 1875; on $360 from 1st April, 1875; and on $150 from March 5th, 1875, until paid; and for all costs. Writs of *fieri facias* were duly issued thereon, and returned "*nulla bona*," (see R., p. 7, Marshal's Return, May 13, 1876,) whereupon he filed his application for a writ of mandamus, No. 7827, to compel the authorities to levy a tax, to pay his judgments.

The relator, in this case, further urges his right to the writ, on an additional ground, based on the following facts: "That on the 20*th June*, 1870, the said City of New Orleans sold and delivered to H. S. McComb, 80,000 shares of stock held by it of the New Orleans, Jackson and Great Northern Railroad Company, for the sum of $320,000, and that by the terms of said Act, No. 109 of 1854, the said shares of stock were "*forever pledged*" *for the payment of the bonds issued by said city under the provisions of said Act, No.* 109; (*see sec.* 3, *Act* 109 *of* 1854, *appendix p.* —;) and your relator urged as an indisputable right to the writ, that said city should be compelled to pay so much of said judgments in favor of relator, as appears from the face of the records in said suits to have been rendered, upon bonds and coupons of said city issued under the provisions of said Act, No. 109 of 1854, out of the proceeds of the sale of said railroad

stock, so "pledged forever;" and that in the event that the payment of the judgments upon said bonds and coupons cannot be enforced in that way, that then the said city should be compelled by writ of *mandamus* to levy and collect within a reasonable delay, to be limited by the court, a sufficient tax to pay said judgments; and that by similar writ the said city should be compelled to levy and collect within a reasonable time, to be limited by the court, a sufficient tax to pay so much of said judgment as appears to have been rendered upon bonds and coupons of said city, issued under the provisions of said Act, No. 109 of 1854; that the mayor and administrators, who represent and exercise the corporate powers of the said City of New Orleans refuse to pay said judgments out of any funds in their possession, or under their control, or to levy and collect any tax to pay said judgments of relator, and put him at defiance, and that he is entirely without remedy to collect said judgments by ordinary levy of execution upon the property of said corporation, &c." A rule to show cause issued, and the city filed the following answer:

"And for answer to the petition of the relator, Morris Ranger, they allege and show, that they admit the said relator has recovered judgment against the City of New Orleans; that an execution has issued and returned no property found, as more fully appears by reference to the judgment, execution and return thereon in the suit of Morris Ranger *vs.* the City of New Orleans, No. — of

the docket of this court, specially referred to for further explanation and greater certainty.

"And further answering, the respondents say that said judgment was recovered upon certain bonds and for the principal thereof made by the City of New Orleans for one thousand dollars each, issued by the said city to the New Orleans, Jackson and Great Northern Railroad Company, under the authority of the Act of the legislature of Louisiana, No. 109, approved March 15, 1854, as appears by said record. And further answering, these respondents say that no tax whatever, for the payment of the principal of said bonds, is directed to be levied or collected by the said Act, or by any other Act of the legislature or provision of law, and these respondents refer to said Act, and especially to the 2d section thereof, to show the absence of such provision; and these respondents show that so far as respects the interest upon the bonds of the city required to be provided for, such interest is provided to be paid out of the back taxes due the City of New Orleans, and such provision is stated in the budget of said city for 1876. Forasmuch, therefore, as the laws of Louisiana have directed no tax to be levied or collected to pay the principal of said bonds, these respondents are wholly without authority to levy and collect said tax, and have no duty to perform in the premises; and this honorable court is without authority to grant the writ of mandamus prayed for. These respondents admit that on the 20th of June, 1870, the authorities of the City of New

Orleans did have a transaction with H. S. McComb, by which they undertook to sell to him certain 80,000 shares of the capital stock of the New Orleans, Jackson and Great Northern Railroad Company, for the sum of $320,000, *which said authorities received.* These respondents aver that no part of said proceeds of said so-called sale is now in the treasury of the City, or in possession or under the control of these respondents, that the said proceeds have long since been used and expended, and no portion thereof ever came into the possession or control of these respondents, the present authorities of said city. These respondents show that no writ of mandamus can issue to compel the payment of the relator's demand out of said proceeds, because said proceeds are not in existence, and these respondents deny that any duty or obligation is imposed on them by reason of or arising out of such transaction, or that in respect to the subject, this court has any authority to issue a writ of mandamus."

To this answer relator filed a demurrer, and the cause being argued, resulted in a decision against the relator. An application for a new trial was made, presenting the following points of error.

First. "Because the judgment admits the relator's right to a *mandamus* to compel the City of New Orleans to levy and collect a special tax to satisfy relator's judgment, obtained for principal and interest of matured bonds of said city, if there is a provision in the statute under which the bonds were issued, or in any other statute of this

Orleans to subscribe for stock in certain contemplated railroads centering in said city. To pay for said stock, the city was authorized to issue bonds, equal in amount to the stock at its par value, (see Acts 1854, Nos. 108, 109, 110.) Judgments have been obtained in this Court for the principal of the sum named in said bonds, and an execution has been issued thereon, which has been returned *nulla bona*. The return then alleges that there is no provision in these statutes, or any other statute of this State, for the levying and collection of this tax, and refers to this statute, especially the second section, to show that the legislature did not intend that any tax should be levied to pay the principal of these bonds, but that it intended that the principal should be paid out of the stock and its revenues.

The question is whether, upon this state of facts, this court can grant this writ?

I think the proposition cannot be questioned that this Court is without authority to direct a levy of a tax unless it be in accordance with the provisions of some law which makes it the duty of the City Common Council to levy the same. In other words, that this Court cannot *create*, but can only *enforce* a clear legal duty.

Mr. Justice Bradley, in Heine vs. The Levee Commissioners, 1 Woods, R. 246 and 247, whose decision was affirmed by the Supreme Court, says: "The power of taxation belongs to the legislative branch of the government. The judicial department has no general power over the

subject. If the officers who are charged with the duty of levying or collecting taxes, refuse to perform their functions, the Courts, in a clear case of failure, and at the instance of the party directly interested, can, by the prerogative writ of mandamus, compel them to perform acts which are ministerial, as distinguished from those which are judicial or discretionary. This is all the judicial department can do on the subject, unless the legislature has expressly conferred upon it further powers."

The question is, has the duty or power to levy this tax been committed by the Legislature to the city administration?

It is urged by the counsel for the relators that prior statutes, namely, those of 1805 and 1836, gave this authority, and that the power to levy and collect a tax may be fairly deduced from the permission to contract the debt.

The Act of 1805, section 6, provides that "the said Mayor and City Council should have power to raise by tax, in such a manner as, to them, may seem proper, upon the real and personal estate within said city, such sum or sums of money as may be necessary to supply any deficiency for the lighting, cleaning, paving and watering the streets of the said city; for supporting the city watch, the levee of the river, the prisons, workhouses, and other public buildings, and for such other purposes as the police and good government of the said city may require." It seems to me that subscriptions to works of internal im-

provement are excluded from all the purposes here specified.

The Act of 1836, page 31, section 4, continued to the several municipalities into which the territory of the old city was then divided the powers of the old corporation, and those powers were again continued when the different municipalities with additions were consolidated. But there is here no power given to levy this tax.

This brings me to consider the second and principal point urged by relator's counsel, viz. That the Legislature by authorizing the increase of the debt, authorized the levy of the tax to pay it.

The decisions of the courts of last resort of several States were cited, which it is not necessary for me to consider, because they depend upon the statutes of these States, nor need I, upon this point, refer to more than one decision of the Supreme Court of the United States. The result of what it has said upon the general subject may be summed up in this: It has held that the collection of judgments of the United States Courts may be aided by mandamus, whenever there is a refusal or failure on the part of the officers to perform any ministerial act *clearly imposed* by law; it has treated the repeal of laws in force at the time of the issuance of the bonds and which carried with them substantial rights, as void; and, generally, has given, in behalf of parties obtaining judgments in the Courts of the United States, the same aid to which parties similarly situated would have been entitled

in the courts of the State in which the cause of action arose; but it has never assented to the unqualified proposition that legislative permission to issue bonds carried with it the authority to tax.

The principle upon which alone such a deduction is maintainable is with its appropriate restrictions clearly stated by Mr. Justice Miller in the case of the Loan Association *vs.* Topeka, 20 Wall., page 655. The question was as to the validity of certain interest coupons upon which an ordinary suit had been brought. The defence was that taxation could only be invoked for purposes distinctively public, and that permission to issue the coupons carried with it the right to a tax to pay them, and that as the purpose for which these coupons were issued was not a public one, the statute authorizing them and the obligations themselves, were void. He had said that ordinarily the debt of municipal corporations had to be paid by means of taxation.

He adds, (page 660): "It is therefore to be inferred that, when the Legislature of a State authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference."

I think it to be indisputable that the absence of any permission by the Legislature for a tax, and the substitution of some other means of payment which was deemed

fully adequate, would as completely repel the inference that a resort to taxation was intended, as would a restriction upon the power of taxation itself.

Now, it is urged by the counsel for the city, that the statute by which these bonds were authorized, shows that the Legislature intended that the principal should be paid by means other than taxation. An examination of this statute has convinced me that the belief of the Legislature was that the principal sum could, and its intent was, that the principal sum should, be paid out of the stock and its revenues. The act pledges in perpetuity the stock for that purpose; it gives the right to the bondholder to convert his bond into stock; it provides that all dividends derived from the stock, above six per cent. should be devoted to extinguish the principal; and while providing with extreme rigor for the payment of the interest, in case dividends from the stock should not be altogether sufficient, and, while providing that until the ordinance levying this yearly tax to pay the interest had been passed by the Common Council, no valid resolution could be adopted, it is profoundly silent as to any tax to pay the principal. The implication is that the Legislature intended the bondholder should, for the collection of the principal sum, look to the stock, at least to the exclusion of taxation.

But, among the statutes of the State, with reference to the city of New Orleans, and among the general statutes of the State, are found acts that give the absence of any

particular means of payment in a city ordinance creating a debt a special significance. The Acts of 1852, No. 51, entitled "An Act to consolidate the city of New Orleans, and provide for the government," etc., section 37, page 54, contains the following provision: "And no ordinance (of the city of New Orleans) creating a debt or loan, shall be valid, unless for some single object, or work distinctly specified therein, and unless such ordinance shall provide ways and means for the punctual payment of running interest during the whole time for which said debt or loan shall be contracted, and for the full and punctual discharge at maturity of the capital borrowed on the debt incurred."

The Act of 1853, No. 258, page 234, provides "that the police juries of the several parishes of this State, and the constituted authorities of incorporated towns and cities in this city, shall not hereafter have power to contract any debt or pecuniary liability without fully providing, in the ordinance creating the debt, the means of paying the principal and interest of the debt so contracted."

A subsequent section provides that "whenever police juries or authorities of incorporated towns or cities shall have provided for the payment of a debt by levying a tax, and shall fail or refuse to cause said tax to be collected, the Court rendering judgment may issue its mandate," etc.

Now, since the general statute, and the statute with reference to the city of New Orleans, struck, with nullity

all obligations of cities, unless the ordinance creating the same, fully provided for the payment; and since one of the same statutes makes special enactments with reference to cases where "the provision for payment shall be by levying a tax," thereby showing that taxation was included in the term "means," it seems to me, that, when a contemporaneous Legislature authorized a city to issue bonds, and prescribed the form of the ordinance which the City Common Council shall adopt, creating the obligation, the absence, in such ordinance, to prescribe any provision for taxation, and the insertion in such ordinance of other means of payment which appear to have been deemed abundantly adequate, of itself repels the inference that taxation was intended.

The Legislature knew that the ordinance was void unless it contained full provision for payment. It meant therefore, to set forth all the "means" which were to be considered as provided, and any addition of means by way of inference is excluded.

It follows, therefore, that since the Legislature of the State of Louisiana has not by any general or special statute expressly or by implication made it the duty of the Common Council to levy this tax, that this court is without any authority to direct its imposition.

It remains for me to consider the special circumstances in the case of Morris Ranger. The petition alleges, and the return admits, the sale of this stock by the predecessors of the present Common Council, provided they had the

power to sell the same, and that they received therefor the sum of $320,000. The return then states that "no part of said proceeds of said so-called sale is now in the treasury of the city, or in the possession or under the control of these respondents; that the said proceeds have long since been used and expended, and no portion thereof ever came into the possession or under the control of these respondents, the present authorities of said city. These respondents show that no writ of mandamus can issue to compel the payment of the relator's demand out of said proceeds, because said proceeds are not in existence." Courts cannot issue a writ commanding the performance of an admitted impossibility.

If there are no funds arising from this sale in the treasury of this city, now under control of respondents, and they were spent years since by respondents' predecessors, then it would be idle to issue a mandate to the respondents to pay the relator out of them. Whatever may be the remedy of the relator by reason of the special facts of this transaction, it is clear that he is not entitled to a mandamus.

Let the demurrers be overruled and the writs of mandamus refused.

ASSIGNMENT OF ERRORS.

1st. That the Court erred in relation to the Act and Ordinances of 1854, and in deciding that there was no law, general or special, imposing upon respondent the duty and obligation to levy a tax to pay plaintiff's judgments.

2d. That the Court erred in questioning the validity of the bonds, after they were merged in valid judgments, so as to affect relator's right to the writ of *mandamus*.

3d. That the Court erred in not giving effect to the judgments of the Supreme Court of Louisiana, in relation to the validity of the railroad tax and said bonds, as previously decided in 9th A. R., City *vs.* Grailhe, and City *vs.* St. Romes.

4th. That the Court gave effect to laws, which impaired the obligation of relator's contract, contrary to the jurisprudence of the Supreme Court of the U. S.

5th. That the Court erred in not issuing the writ as to the proceeds of the sale by the city, of the 80,000 shares, "*forever pledged*" to secure the bonds issued for said stock.

ARGUMENTS AND AUTHORITIES.

On the face of the record, it shows ordinary judgments, executions and returns *nulla bona*, for so much money due the plaintiff, and by the doctrine of "*Res adjudicata*" relator is a creditor, whose debt is unquestionable and irrevocable, to be liquidated by the exercise of defendant's general powers of taxation, which are ample and such as are usually conferred on municipal corporations. We recognize no necessity founded on law or reason, for entering into any lengthy investigation of the origin of the evidences on which those judgments are founded, because they are merged in the judgments and immediately become an unquestionable debt, to be provided for by taxation, the duty to levy which has been distinctly confided to, and imposed upon, the defendants by special and general legislation, to enforce which is the sole object of the present litigation. A review of the legislation, ordinances and decisions sustaining their legality and constitutionality, will be found in the Appendix.

Notwithstanding these judgments are final and irrevocable, the learned judge below enters into an imperfect history of the origin of the bonds on which they are based, and of the legislation authorizing the creation of the debt, and he seems to discover and he acts upon the vague intention of legislators in 1854, as to their then expected mode of ultimate payment of the principal when the bonds should mature twenty years after. He reaches a

strange result, viz. that while ample and onerous provisions are carefully made for meeting the interest accruing up to maturity, there is no provision, general or special, looking to taxation to pay the capital when due; or in other words, it was optional with the City of New Orleans to make these bonds a perpetual loan, and after maturity there was no obligation even to provide for subsequently accruing interest, and that creditors like relator might "whistle" for their money, and are utterly without remedy in the Federal Courts.

Now the history of these bonds is very simple, and should it be deemed by this Honorable Court necessary to investigate, easily traced. In 1852, the City of New Orleans was authorized by law, to subscribe to $2,000,000 of stock, or 80,000 shares in the New Orleans, Jackson and Great Northern Railroad, (see Appendix, Act No. 65.) The ordinances were passed and approved by the voters of the city; the stock was subscribed for and delivered, and a valid debt created; the legality and constitutionality of which were tested and decided, and finally settled in two or three cases by the Supreme Court of the State, (see case of Police Jury *vs.* MacDonogh, 8th Ann., p. 341. New Orleans *vs.* Grailhe, 9th Ann., R., 573. New Orleans *vs.* St. Romes, same vol., 573.

Under the sanction of these judicial determinations, relator acquired the bonds, for full value, before maturity and free from all equities. Under such circumstances, it has been well settled, in 16 Wall, page 690, Olcott *vs.*

Supervisors, that "if a contract, when made, was valid, under the constitution and laws of a state, as previously expounded by its judicial tribunals, and understood at the time, no subsequent action by the Legislature, *or the judiciary*, will be regarded by this Court as establishing its invalidity. 3*d Wall*, 294; 1*st Wall*, 175; 16 *Howard*, 432.

This right became part and parcel of the bonds, and permeated every fibre of the contract between creditor and debtor.

"The laws which exist at the time of the making of a contract, and in the place where it is made and to be performed, enter into and make part of it. This embraces those alike which effect its validity, construction, discharge and enforcement. The remedy or means of enforcing a contract is part of that obligation of a contract which the constitution protects, against being impaired by any law passed by a State. Nothing is more material to the obligation of a contract, than the means of enforcement; the ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the constitution against impairment. The obligation of a contract *is the law which binds the parties to perform their agreement.*" "Any impairment of the obligation of a contract, (*the degree of impairment is immaterial,*) is within the prohibition of the constitution. *Whenever such a result is produced by the act in question, to that extent it is void.*"

"The States are no more permitted to impair the efficacy of a contract in this way, than to attack its validity in any other manner. Against all assaults coming from that quarter, whatever guise they may assume, the contract is shielded by the constitution. It must be left with the same force and effect, including the substantial means of enforcement which existed when it was made. The guarantee of the constitution gives it protection to that extent." (See 4 Wall, 535.) The effect of these propositions upon the judgment before us, your Honors said, requires but a single remark. "A clearer case of a law impairing the obligation of a contract, within the meaning of the constitution, can hardly occur." 16 *Wall*, 318. At one "fell swoop," the learned Judge below, has attempted to do what is inhibited to the Legislature of a State, or to its judiciary. He deprives relator of his vested rights, and denies to him "*due process*" of law to enforce the obligation. He actually destroys the obligation altogether, while he leaves unannulled the judgments rendered thereon, to remain "barren sceptres" in our hands. The above principles of jurisprudence should be as applicable to his court, and as binding on its conscience as they are upon any State Legislature, or any subsequent decision of a State Judiciary.

In the cases of Grailhe *vs.* St. Romes, in 9th Ann., the writer of the present brief was of counsel for the city of New Orleans, and every possible question was made to illegalize the tax resulting from the subscription, and by

the ablest counsel. The court was presided over by such judges as Slidell, Ogden and Campbell, and decisions were rendered, marked by great learning and care, maintaining the views of the Court in the case of Police Jury *vs.* McDonogh, 8th Ann., 341, and approving the legislation by which bonds were substituted *in lieu* of the original subscription. After these decisions, all opposition to the collection of the railroad taxes ceased, and the bonds were negotiated under the sanction of their solemnity, and became favorite securities in the commercial marts of this country and in Europe. To show the care and deliberation of the Court, we quote from Judge Slidell, in 9th Ann., 567.

"Some time since, we had occasion to consider the question of the constitutionality of the Act of 12th March, 1852, entitled, 'An Act providing for the subscription of the parishes and municipal corporations of the State, to the stock of corporations undertaking works of internal improvement, and for the payment and disposal of stock so subscribed.' The subject was deemed of so much public importance, and so large a mass of the community was interested in the question, that the Court invited argument from the profession generally, and without reference to a retainer in the particular case. The cause was ably argued, and after careful deliberation, resulted in a unanimous decision in favor of the constitutionality of the statute. Upon the faith of that decision, we may reasonably presume that manifold contracts have been

entered into, and large advances of money made; the railroad enterprises then initiated, being of great magnitude. To overthrow the decision of a question of such moment, would involve a responsibility most grave, and which a court of justice should not assume without the most clear and unqualified conviction that its former conclusion was erroneous. A vacillating jurisprudence is a grievous evil. It would be especially deplorable with regard to constitutional questions, embracing a wide practical range, "*Misera est servitus ubi jus est vagum aut incertum.*" Every formality required by law was pursued, and was strictly scrutinized by the resisting tax-payers. Ordinances were carefully prepared and submitted to the vote of the people. Two elections were held and resulted in a full victory for the subscription. The bonds, twice sealed and ratified by popular approval, were issued to the companies, and became, as they were entitled to be, first class securities all over the world. The decisions cited were provoked by, and, as stated, resulted in a complete victory of the City of New Orleans in favor of the validity and constitutionality of the legislation, sanctioning the creation of the debt with ample means for the extinguishment of the same at maturity of the bonds, as for any other ordinary liability.

As aptly stated, by a brother counsel, in a similar case, "from the date of the passage of the Acts of 1854 down to the present time, full twenty-four years, not a voice has been raised in court against the validity of these

bonds. Even the holders of the consolidated bonds of New Orleans, when assuming to themselves the championship of the city's cause, in the Federal Courts, and attacking all bonds of the city of New Orleans as null and void, *excepted these New Orleans and Jackson Railroad bonds.* Not a single tax-payer or tax-resister, ever thought of enjoining the issue of these bonds, or the payment of interest upon them, or of resisting the payment of taxes to pay interest. For a quarter of a century thirty dollars has been paid semi-annually upon these bonds, with a clock-like regularity. The Legislature has recognized these bonds as valid, not once, but five or six times. The city has ratified, not once, but by twenty-five or thirty distinct ordinances, and has finally placed a seal upon them forever, by agreeing to exchange them, when presented, as "valid and recognized bonds, for premium bonds, issued under Act No. 31 of the Acts of 1876." Every sanction of law has been thrown around these bonds to shield them from the breath of suspicion and to enable them to court the confidence of the capitalist, all in the interest of, and at the solicitation of, the City of New Orleans, and she is without an equity even against the railroad company, and none against relator.

These bonds, so mantled with the solemn sanctions and safeguards of legislative and judicial indorsement, have been negotiated for full value, and are now in the hands of innocent third parties, merged in judgments; and yet we are seriously told by an eminent and learned Federal

judge, that as creditors, we are helpless to enforce payment against the will of our debtors. He goes further and declares, *arguendo*, that the Act of 1852, No. 51, "entitled an Act to consolidate the City of New Orleans, &c.," (sec. 37, p. 54,) strikes with nullity these railroad bonds, because there was no provision for the full and punctual discharge at maturity, of the capital borrowed on the debt incurred." The answer of defendant raised no such question, but, on the contrary, especially admitted the validity of the bonds. They only contended that the bonds were to be liquidated at maturity, out of the sale of the stock. It seems to us that it was incompetent for the court *a qua*, and that the learned judge went out of his way, to examine and decide questions not raised by the pleadings and beyond his reach, so long as relator's judgments stood as valid records of his court. All these issues had been made, discussed and decided, years before, by the highest courts of the State, in relation to a special railroad tax, for a subscription of stock, out of which liability the bonds in question had their origin.

Your honors will find that the mode of extinguishing the debt was fixed by the act of the Legislature and the ordinance providing for the original subscription to six annual installments of taxes; hence its constitutionality, when questioned, was twice maintained by the Supreme Court of the State. The intention of the Legislature, the Corporation of New Orleans, and the voters, was clearly expressed; which was that a special tax, for six years,

should be levied on real estate and slaves, to pay for the stock and extinguish the debt thus created. This was under the Act of 1852. The Corporation levied a tax of $333,333⅓, for years 1852 and 1853, designated as the "*Jackson Railroad Tax.*" But it proved difficult and slow to gather taxes, and the necessities of the railroad to have money to complete it, were so pressing, that it arranged with the city to induce the Legislature of 1854 to substitute bonds for their subscription of $2,000,000. Hence the Act of 1854 was passed, and the bonds were issued accordingly, after proper ordinances were submitted to, and accepted by, the voters.

This was *not* the creation of any *new* debt, in violation of the charter, quoted by Judge Billings, as making no provision for the extinguishment of the capital, and therefore void, but was simply pretermitting payment of a valid debt, extinguishable in six years, by taxation, on substituting therefor a bond payable in twenty years. The laws authorizing the levy of an annual railroad tax on property holders were merely by and with the people's consent, postponed or suspended till the maturity of the bond; and it was supposed too clear for doubt, or even argument on general principles, that the Corporation possessed ample powers, and it became its duty to protect the credit of the city by levying taxes to pay these bonds when they fell due, as it had the right to do for any other matured debts. Indeed, the decision of the Supreme Court, in Grailhe's case, passed upon the constitutional-

ity of these bonds. The validity of their substitution for the subscription, originally made under the Act of 1852, was clearly maintained by the decision, and is discussed by Judge Buchanan, (dissenting,) and it was upon the faith of that opinion that the bonds were floated as first-class securities, and were always regarded by capitalists with peculiar confidence.

We here refer to Judge Buchanan's decision in the Grailhe case, in 9th An., 571, which is more important on this point, because he dissented on others, to show the connection between these bonds, with the original subscription, the legality of which was being questioned. He said:

"It is apparent, from a review of the legislation, that the subscriptions to railroad stock, authorized by the two Acts of 1854, were intended *to take the place* of the subscription to stock of the same companies, made by the city ordinances of the 13th and 17th May, 1852," and again, "The city subscription of 1852 to the stock of the two railroads, having been superseded by subscriptions to a like amount in 1854, *which last is either paid or payable in city bonds*, what is the position of the property-holder upon whom was assessed the first subscription?" The Act of 15th March, 1854, authorizes the city of New Orleans to subscribe for the stock of certain railroad companies directly, *in lieu* of the tax, convertible into stock by the taxpayer, imposed by the ordinance passed under the provision of the Act of 12th March, 1852. The Act

requires the council, under certain conditions, to repeal the ordinance, but contains the following proviso: "provided, that the repeal of the said ordinance shall not be so construed as to relieve the city from its liability to collect and pay over to said railroad, that portion of the railroad tax imposed under said ordinances for the year 1853, which has not been collected and paid over to said company. This proviso immediately follows the peremptory requirement, by the legislature, of a repeal of the ordinances of the 11th May, 1852, viz. The imposed taxes on all landed estates, collectable one-sixth each year, through six years, 1853, 1854, 1855, 1856, 1857, 1858." In the 11th Ann., p. 632, your Honors will find that Judge Buchanan said his views in the Grailhe case "are still unchanged, but I think the plea of unconstitutionality of the law which authorizes the police jury to levy the tax in question, like any other defence, might have been pleaded before judgment, is barred by the exception of *res judicata*, founded upon the confession of the Parish of Caddo, in favor of the Vicksburg, Shreveport and Texas R. R."

We therefore contend, that considering that these bonds were issued as a substitute to extinguish a valid and constitutional debt, possessing all the prescribed essentials when incurred, providing for its extinction when due, are not subject to the prohibition quoted by Judge Billings from the charter of consolidation passed in 1852, sec. 37, p. 54, "that no ordinance *creating a debt* or *loan*,

shall be valid, unless for some single object or work distinctly specified therein, and unless such ordinance shall provide ways and means for the punctual payment of running interest during the whole time for which said debt or loan shall be contracted, and for the full and punctual discharge at maturity of the capital borrowed on the debt incurred." Now, it was the identical Legislature of 1852, which authorized the city to submit to its voters the question of subscribing for 80,000 shares of the Jackson railroad stock, to create a debt and pay for it in six years by annual taxation, and it seems preposterous to pretend that it was authorizing the city to violate the charter just passed, by incurring a debt or loan for which they were not bound by the provisions of that charter. When in 1854 the Legislature authorized the city to issue these railroad bonds to relieve the taxpayers from the burden of an annual tax in order to extinguish a previous debt, legally incurred, no man, woman or child, no capitalist, jurist or lawyer, in the State of Louisiana, ever dreamed that the city was violating Sec. 37, so far as these bonds were concerned, or "*creating a debt*" *or* "*loan*," or subscribing to some work distinctly specified therein, or that it required any further legislation or ordinance to be specially passed to provide for the "full and punctual discharge at maturity of the capital borrowed on the debt incurred." They well knew that the debt in this case had been lawfully incurred, and the means of extinguishing it had been provided, and that their property was fully mortgaged

and bound for the whole debt by ample powers of taxation possessed by the corporation,—and when this indisputable liability was transmuted or merged in the bonds substituted, under special legislative authority, it seems a monstrous and vicious doctrine in law or morals to say, that these bonds are stricken with nullity as contrary to the charter, under provisions intended for a very different character of debt or loan. The provision in question was clearly intended as restrictive of any new debt or loan, for works of public improvement, but was never intended to prevent the city from issuing bonds as a *substitute* for a previous debt validly incurred, according to the provisions of its charter, but for which the taxpayers would have had to pay the debt in four, rather than twenty years.

We contend that Section 37, of the City Charter of 1852, distinctly points to the *contraction* of a *new* debt, and not to a *new provision* for paying an old debt, validly incurred, by substituting bonds authorized by law, to be issued in lieu thereof. This debt was incurred, and was unquestionable, under the Acts and Ordinances of 1852, and was binding before the passage of the Acts and Ordinances of 1854. These latter acts merely provided a new and different mode of payment, under the old subscription for the 80,000 shares, and not to contract any new debt or loan, within the meaning of the denunciation contained in the 37th Section of the charter. The spirit of that article, however, was fully respected when the Act

of 1852 was passed, and every provision for extinguishing the debt duly foreseen. Subsequently bonds are issued to take the place of taxation, and the interest is confessedly provided for by both the acts and the ordinances, yet our opponents, and the learned Judge say: "That the stock subscribed for by the city, was intended to ultimately extinguish the principal of our bonds." This may well have been both an expectation and a hope, but it was no part of relator's contract, and the stock was merely "forever pledged" as additional or collateral security, with permission for ten years, at the option of the bond-holder to convert his bonds into stock. Judge Bradley, in 6th Otto, page 210, decides this case, when he says: "In voting the bonds, they may have acted, and undoubtedly did act under the expectation, that the proposed tolls would relieve them from some taxation for their payment, but if mistaken in this, that is, in their power to exact tolls,—how can this affect the bonds?" The title, however, remained in the city of New Orleans, and the stock was sold for $320,000 by the pledgors.

We see all the constitutional exactions and requirements fully complied with, both in relation to the original creation of a debt, payable by taxation, in six annual instalments, and to the issue of city bonds in lieu thereof, payable at twenty years, with six per cent. interest. "*Adequate means*" are provided for meeting the interest up to their maturity. The "adequacy" of the provision for the principal, rests on the ordinary obligation to pay

your debts as they fall due, and keep your plighted faith, under the ordinary powers granted to levy taxes for that purpose, and is not to be ignored or affected by the fact that war, bad government, mismanagement of railroads, and the other misfortunes to which our unhappy section has been subjected within the last twenty-five years, have falsified and disappointed all human anticipations, and destroyed what *ab initio* may have been deemed a chance for reimbursing the taxpayer, what he had paid in these bonds for the stock.

When the charter speaks of "ways and means for the full and punctual discharge at maturity of the capital borrowed, on the debt incurred," or the constitution of "adequate means to extinguish accruing interest and the principal," it contemplates at most, means adequate, in the opinion of a man of ordinary sense, at the time the law was passed. It never intended the validity or invalidity of a debt to depend upon the changes of times, or irresistible revolutions, affecting the value of property subject to taxation to pay that debt. It hardly means that a debt or bond, valid to-day, should be absolutely null and void to-morrow, and valid again the day after. It never intended a creditor's right to payment to depend upon the fluctuations in the market value of the property pledged or mortgaged to him as security, or upon the "ups and downs" of the stock market, or the poverty of his debtor, when his case is called for trial. We conclude therefore, with due respect, that the debt which the city

of New Orleans was authorized to contract, and which she did contract, was valid and constitutional, and so far as the principal of the debt was concerned, when it became due, not limited for its payment to any special funds, but was to be met and provided for under its general powers to levy taxes to pay its debts and current expenses.

Sections 1 and 2 of the Acts of the Legislature referred to, authorized the city, under certain contingencies, to incur the obligation of paying for 80,000 shares, at $25 per share, of the New Orleans, Great Northern and Jackson Railroad, and to issue in payment, her bonds, payable twenty years after date, with six per cent. interest. The bonds were duly and lawfully issued; the city held the stock and elected directors to represent it, until it was sold by them to McComb in 1870, four years before the maturity of these bonds, notwithstanding it was "*forever pledged*" to the holders of those bonds, as an additional security for the unconditional liability of the city to pay the principal at maturity. The city has spent, squandered or disbursed the proceeds of this doubtful alienation, as she avers, but denies, through her present representatives, any duty or obligation to account for these funds. The Court below maintained respondent's peculiar attitude, by adopting a theory at war with all our preconceived ideas of the unchangeable identity of a corporation. We have been taught to believe that there was not, in law, any distinction to be drawn between the acts of one set of representatives of the city in 1870, and the obliga-

tion imposed on another set of representatives in 1874, springing from those acts, and that they should be rather all considered as the acts of the city, rather than the doings of any particular set of officers, administering for a term, her affairs, at any particular time. Their official acts bind the city, and it is the city, through her officers, in their official capacity, who are now called on to perform the duty and obligation of accounting for this money, the proceeds of property, "*forever pledged*" to pay our bonds.

The city never changes as a corporation, though its officers may, just as the "waters of the river Thames are constantly changing, yet it is always the river Thames." There is no merit in this attempted distinction, and if, as Judge Billings says, and the defendant admits, respondent's predecessors spent this money years since, then we reply that they left behind them a legacy of duty on their successors, that ought not to make it "idle to issue a mandate to pay relator out of them." In contemplation of law and official obligations, money thus received by the officers of a corporation, and deposited into its treasury, *is still there* and cannot be "spent years since," or be illegally disbursed out of its coffers, so as to evade the responsibility of paying it to those to whom it legally belonged. If the city has used it, it must be restored; if its officers have pilfered it, let it protect itself by recourse to their bonds or their personal liability, civilly and criminally; but it seems a mockery of law and com-

mon sense to taunt relator with having mistaken his remedy, when the learned judge adds "whatever may be the remedy of the relator by reason of the special facts of this transaction, it is clear that he is not entitled to a mandamus." If relator be not entitled to a *mandamus* upon this point, then indeed have we here a "right without a remedy," for what would be more idle, than to pursue defunct officers of a city, for having obeyed certain laws and ordinances, and who turned into its treasury the proceeds of the sale, as is admitted by defendant's answer, when he avers that "the authorities of the city received the $320,000"? (See answer, p. 8.) What has relator to do with these ephemeral representatives of a great city, his debtor, that he should pursue them, to account for these vanished funds? *Nothing!* Who would be so mad as to advise a client that these *ex*-aldermen were at any time answerable to him for a violation of their official duty, in a direct action? *No one!* Can the city take advantage of her own wrong and remit relator to a pursuit of those who have betrayed her? *Of course not!*

The rest of the Act of the Legislature, as shown in the Appendix, p. 6, contains provisions relative to the payment in bonds of the debt thus created and *inter alia pledges without delivery*, the stock for the ultimate security of the bonds. It is intimated by the learned judge, and was claimed by respondent, that this provision affects the unconditional nature of the debt due by the city to

the bondholders, and limits the liability of the drawer of this commercial instrument or promissory note, to the stock pledged; and that relator can only "look" for payment of his debt to the proceeds of the stock. He says, "now it is urged by the counsel for the city, that the statute by which these bonds were authorized, shows that the Legislature *intended* that the principal should be paid by means, other than taxation. An examination of the statute has convinced me that the *belief* of the Legislature, was that the principal sum could, and its *intent* was, that the principal sum should, be paid out of the stock and its revenues." Suppose we were to concede that it was the "intention" and it was "the belief" of the Legislators, who passed the Act, and moreover, of the Corporation, its voters and the directors of the contemplated railroad, how would that alter the legal responsibility of the parties contracting, it not being therein embodied as a condition? That "intention and belief" might well have been the *motives* for the act and subscription, but they are not so "nominated in the bond." But suppose these motives were legitimately discernable from an inspection of the Act, as the Judge below asserts, how then can he reconcile respondent's conduct, with the alienation of that stock, and refuse to issue the *mandamus* for the amount it produced, and which was received from McComb? "The *implication*," says Judge Billings, "is that the Legislature *intended* the bondholder should, for the collection of the principal sum, "*look*" to the stock, at

least to the exclusion of taxation." We cannot discover any such "implication" or "intention," and are driven to suspect that his Honor is a greater spiritualist than we are, if he could discover or ascertain what was the "intention" or "belief" of a lot of Louisiana legislators, twenty-five years ago, and to act upon it, in a solemn decision, which shatters all confidence in the minds of capitalists, as to the liability of a corporation to discharge its obligations and preserve its plighted faith. If such had been the "intention and belief" of the legislators, and if such an "implication" were fairly deducible from the statute, then the duty imposed upon the respondent to preserve that stock, was sacred and paramount, and relator had the right to expect from Judge Billings that he would hold the respondent to a rigid accountability for this solemn trust; and he could hardly have been too severe or indignant at the avowed deliberate sale, in the answer of respondent or the "nonchalance" with which it accounted for the "proceeds," to which relator was blandly advised to "look" for the "collection of the principal of his bonds, to the exclusion of taxation." On this branch of the case there cannot be a serious doubt as to the error of refusing relator the *mandamus*, and we leave it to continue the discussion of the main question, with the remark that we know of no general principle of law, limiting a pledgee to recourse alone against the pledge. The respondent must rely upon some supposed peculiarity in the liability of a public corporation, which has secured its

indebtedness by a pledge. We have searched in vain for any decisions or any law to sustain such a proposition, but can cite authorities in the opposite direction. We refer particularly to the case of the United States Ex. Rel. Johnson *vs.* County Court of Clark Co., (6th, Otto., 214.) This decision seems directly in point.

"It shall be lawful for the corporate authorities of any city or town, or the County Court of any county, desiring so to do, to subscribe to the capital stock of said company, and may issue bonds therefor, and levy a tax to pay the same, not to exceed one-twentieth of one per cent., upon the assessed value of taxable property, for each year. It is to be noticed that the act imposed no limit upon the amount which it empowered a county to subscribe, and for the payment of which, authority was given for the issue of county bonds. This was left to the discretion of the County Court. So it has been held by the Supreme Court of the State, (57 Mo., 129.) A limitation was, however, prescribed for the *special* tax, distinct from, and in addition to, the ordinary tax, which, by other statutes, the County Court was authorized to levy, probably supposed to be made necessary by the new liabilities the county might assume. There is no provision in the act, that the proceeds of the special tax alone shall be applied to the payment of the bonds, none is expressed, and none we think, can fairly be implied. It is no uncommon thing in legislation to provide a particular fund as security for the payment of a debt. It has often been done

by the states, and more than once by the Federal Government. The Act of Congress of February 25th, 1862,(12 Stat., 346,) set apart the coin paid for duties on imported goods, as a special fund for the payment of interest on the public debt, and for the purchase of one per centum thereof for a sinking fund, yet no one ever thought the obligation to pay the debt is limited by the amount of duties collected. Limitations upon a special fund, provided to aid in the payment of a debt, are in no sense restrictions of the liability of the debtor. Why then, must not the special tax of one-twentieth of one per cent. be regarded as merely an additional provision made for the payment of the new debt authorized, rather than as a denial to the creditors of any resort to the ordinary sources from which payment of county debts is to be made? Why should such a provision be construed as placing the holders of the bonds in a worse situation than that of other creditors of the county? These bonds are a debt of the county, as fully as is any other liability.

"Had the act which gave power to the county to issue them said nothing of any special tax, there could be no question that the holders of the bonds, like other creditors, would have a resort to the money in the county treasury of any sum of money found by them to be due from the county. It would, therefore, have been the Court's duty to direct its clerk to issue a warrant for payment, as in other cases. And surely it is not to be held, unless such a construction of the statute is abso-

lutely necessary, that when the legislature authorized the county to incur the debt, it intended to deny to the creditor the right to look to the treasury of the county for its payment, in other words, that the debt was sanctioned, but that it was stripped of the usual incidents of a debt, and the debtor relieved from attendant liabilities. *And it is not to be inferred*, from a provision giving the creditor the benefit of a special fund, that it was intended to place him in a worse position than that he would have occupied had no such provision been made, and that, too, in the absence of any direction that he must *look exclusively to that fund*. Such is not a reasonable construction of the statute. Such is not a fair *implication* of its purpose. Yet it is for such an implication the defendants contend, and upon it, their case wholly rests." The learned Judge, *a quo*, confesses that his reasons rest on "implication," and mere inference. It seems to relator, that in doing so, he violates the canons of reasonable construction. The same rules of construction had been laid down by his Honor, Justice Miller, in the Topeka case, and that decision is actually quoted by Judge Billings in his judgment, but its principles completely ignored or misunderstood. Judge Miller, after saying, that ordinarily the debt of a municipal corporation had to be paid by means of taxation, adds (p. 660, 20 Wall,) "It is therefore to be inferred that, when the legislature of a State authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary

to pay the debt, *unless there is in the act itself*, or in some general statute, a limitation upon the power of taxation, which repels such an inference."

Judge Billings, we submit, "assumes too much" in this case, and has *inverted* the rule of construction, thus clearly enunciated, when he says, "I think it to be indisputable that the absence of any permission by the Legislature for a tax and the substitution of some other means of payment, which was deemed fully adequate, would as completely repel the inference that a resort to taxation was intended, as would a restriction upon the power of taxation itself." It would seem a complete answer to the assumption, "that in our case the Legislature had provided adequate means of payment, exclusive of taxation," to ask a simple question, viz. Suppose the Jackson Railroad had never negotiated a single bond and stood to-day the holder and owner of the whole issue for the 80,000 shares of stock, and at their maturity were demanding payment? What a mockery of law and justice would it not be for the city to tell them "look to the stock you sold and delivered to us." "We have no other means or power to pay you." "No taxation has been provided to pay you." "When we subscribed, you induced the Legislature to 'intend and believe' that in twenty years, your stock would be at par and paying valuable dividends, like the Baltimore and Ohio Railroad, or we never would have bought and taxed our people to pay the interest on the debt, punctually." And, suppose the railroad company

replied, "but you sold these 80,000 shares at $320,000, and you received the money from McComb, and if we are to 'look' to the stock, then you have made a profitable business by the ceremony of merely printing two thousand bonds, which, you say, are uncollectable by taxation, and received $320,000 in return, which you have spent." Because, we believed that the stock and dividends would ultimately be so valuable, as to exceed the cost, we are not aware that we agreed that you should not pay for it, in case it resulted otherwise.—"*Non, non haec foedera veni.*" If this be sound logic, with how much more force can relator, who is an innocent third holder and transferee, press it upon your Honors, to show the folly and fallacy of such a pretension. If the city has been disappointed in its purchase, why should relator suffer for their misplaced confidence or folly?

Now let us refer again to the United States Ex. Rel. Johnson *vs.* Clark Co., where the Supreme Court of the United States, says: "we have been referred to the cases of 'supervisors of Carroll County *vs.* United States, 18 Wall., 71, and State *vs.* Shortridge, (56 *Mo.*, 126,') as sustaining the construction of the statute contended for by the defendants. In fact, however, they afford it no support. In the former of these cases we held that a statute of the State of Iowa conferred no power to levy a *specific tax* to pay a judgment rendered against a county on warrants for ordinary county expenditures, and we asserted that a *mandamus* will not be awarded to compel

county officers of a State to do any act which they are not authorized to do by the laws of the State from which they claim their powers. We adhere now to what we then decided. But we have in hand no such case. The present is not an attempt to enforce the levy of any *special tax, or of any tax.* It asserts no power in the county to levy a tax, which the defendants deny they have. It claims only a right to share in the product of a tax confessedly authorized. We do not, therefore, perceive that the case has any applicability to the subject before us. And State *vs.* Shortridge, though claimed to be in point, is equally inapplicable, when it is observed what the case was and what was decided. It was a suit for a mandamus to compel the County Court of Macon county to levy a tax for the payment of principal and interest of several railroad bonds, issued in payment of a subscription by the county to the capital stock of the Missouri and Mississippi Railroad Company. The bonds had been issued by virtue of a legislative Act similar to that under which the bonds of the present relator were issued. *The county had levied the special tax authorized by the Act,* and the application was for a *mandamus* to compel the levy of *another tax specially for the payment of the bonds,* in addition to that allowed, namely, that of one-twentieth of one per cent. The court refused the writ, holding that no other special tax was authorized by law than the one mentioned in the *charter of the railroad company;* and as that had been levied, that there was no right to levy

another. This was the only question before the court, and the decision is authority only to the extent of the case before it. The court does not appear to have decided that the County Court could not levy a *general tax* for the expenses and liabilities of the county. It was only called on to consider how far an extraordinary or special tax could be levied. The case called for nothing more, and if more was intended by the judge who delivered the opinion, it was purely *obiter*. In the present case, as already said, there is no effort to enforce the levy of any special tax." So in relator's case we ask for a "*mandamus* to levy and collect a sufficient tax to pay our judgments," and not for any special tax, under any special provision in any railroad charter, or Act of the Legislature, outside of the general laws, conferred on the defendant as a public corporation to pay its matured liabilities, and preserve its good faith and honor. As Judge Woods said, "this was the only right relator had to collect his judgments." 2 Woods, p. 129.

We now deem it appropriate to call the attention of the Court to what was decided in another litigation between these parties, on the equity side of the Circuit Court in Louisiana, in November, 1875.

In Ranger *vs.* City, 2 *Woods*, 129, Judge Woods particularly recognized the validity of relator's bonds, in the following extract, page 132. "In the case of Maenhaut *vs.* City, 2 Woods, 108, I expressed the opinion, and I still adhere to it, that the provisions of the 37th Section

of the Act of 1852, that Act being, in fact, the charter of the city, providing how the debts of the city should in future be created, and limiting the power of the city in contracting debts, formed a part of the contract between the city and those who received and held the consolidated debt, *and the bonds issued by authority of the provisions of Acts Nos.* 108 *and* 109 *of the year* 1854. In my judgment, the holders of the bonds under these two acts, had the right to demand of the city, in accordance with the terms of the 37th Sec. of the Act of 1852, that no further debt or loan should be contracted by the city, unless the same should be authorized by the vote of the majority of the voters of the city, and no ordinance, creating a debt or loan, should be valid unless for some single work or object distinctly specified therein, and unless such ordinance should provide ways and means for the payment thereof, and such ordinance should not be repealed until the principal and interest of the capital borrowed, should be fully paid and discharged." Here we find Judge Woods, in November, 1875, asserting that these bonds were valid and unquestionable, and of equal rank and dignity with the consolidated bonds, provided for in the 37th Section, Acts 1852, and as sacredly protected by that provision, and afterwards, His Honor, Judge Billings, in the same Court, deciding in April, 1876, that these bonds were tainted with nullity, as contrary to the provisions of this identical 37th Section. We also find that Judge Woods, in 2d Woods, page 134, says, speak-

ing of relator in this case: "It seems to me that the complainant has mistaken his remedy. He has his bonds and judgment upon them, and *he has the right to have a tax levied to pay the principal and interest upon these bonds.* That is the only right he has, and that right is only to be secured by the common law remedy of *mandamus.*" On the other hand, Judge Billings decides, "that relator has no right to have a tax levied to pay the principal and interest upon these bonds, and that he is not entitled to the writ of *mandamus,*" and must "look to the stock which respondent admits has been sold. When judges of the same court disagree, your Honors alone, can decide which is right.

In 2d Woods, page 135, Bonner *vs.* City of New Orleans, Judge Woods again held these bonds to be legal, and gave judgment against the Jackson railroad, as an ordinary endorser of a commercial instrument, for one of the same series as those held by relator. In this case, the *city admitted its liability on the bond.*

The Court is respectfully referred to a case in point, in 2 *Bissell, page* 408. Judge Blodgett says: "The bonds for which this judgment was rendered, had been legally issued, and the city authorities and voters were all chargable with notice that they were due and ought to be paid, They should then have levied and collected an adequate tax, in apt time to have the money ready when their obligations matured, and having failed to do, are guilty of a breach of duty, which the writ of mandamus will compel

them to perform;" and again, "The aspect of the case is this. The respondents owe the debt, and acknowledge their legal and moral obligation to pay it, but have failed to take the necessary steps to raise the funds wherewith to do so. They have the power to levy and collect an adequate tax, and their duty is co-extensive with that power," and he ordered a peremptory mandamus in a case almost identical with the one at bar. See also, 5th Wall, 705, City Galena *vs.* Amy. "If a city *may* levy a tax, it can be compelled by mandamus to do so," see also 4th Wallace, Supervisors *vs.* U. S., p. 435.

Van Hoffman *vs.* Quincy, 4th Wall., 535.

People *vs.* Cairo, 50 Ill., 154.

Riggs *vs.* Johnson, 6th Wall., 166, and Id., 210, 517.

And relator respectfully cites the following authorities:

"If bonds are legally issued, their payment must be raised by taxation."

Allen *vs.* Inhabitants of Jay, 60th Maine, 127.

70 N. C., 307.

65 N. C., 403.

3 Bush. Ky., 144.

2 Abb., U. S., 53.

Sharpless *vs.* Mayor of Phila., 21st Penn. State, 147–167.

Hanson *vs.* Vernon, 27 Iowa, 28.

Whiting *vs.* Fond du Lac, 25th Wis., 188.

1 Dillon, 522.

24 Michigan, 458.

2 Biss., 77.

In 4th Wallace, 535, Van Hoffman *vs.* City of Quincy, your Honors held that "it is clear that where a State has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn, until the contract is satisfied." Nor "can subsequent laws deprive the holders of rights they had at the time the bonds issued." 4th Wall., 435. 14 Wall., 616, 314, 678.

The power to tax is implied from the power to contract." We have shown 1st, the city had authority to subscribe and create the debt. 2d, By Act 109, of 1854, the Legislature authorized it to issue bonds, and that all the conditions precedent had been pursued and were examined and passed upon by the highest court in the State, and their constitutionality maintained in 9th Ann., Grailhe and St. Romes' cases. The consolidated Act of the Legislature of 1852, confers ample powers to levy taxes to pay its debts, current expenses, accruing interest and matured obligations. See also following authorities:

Dillon on Municipal Corp., vol. 2, p. 779.
9 Wall., 412.
20 Wall., 660.
12 Iowa, 342.
25 Ill., 595.
50 Ill., 454.
21 Cal., 668.
15 Wis., 30.

16 Wis., 186.
17 Wis., 687.
20th Wis., 50–79–87.
44 Miss., 116.
57 Penn., 290.
43 Penn., 290.
36 Ala., 439.
45 Ala., 730.

"*A mandamus will lie to enforce the levy of a tax impliedly authorized,*" 7 Wall., 708. High on Ex. Rem., sec. 397.

4th Wall., 435, 780.
5th Wall., 705.
10 Cal., 570.
3 Sandf., 535.
8 Wall., 580.
6 Wend., 486.

From the foundation of the city in 1805, up to 1836, and throughout all successive changes, it has been endowed with the usual powers of taxation, as cited by the judge in his decision, and in the charter of 1856, sec. 42, p. 37 of Leovy's digest, authority to tax was conferred by the Legislature in the following words:

"That the Common Council of the City of New Orleans, shall, for the purposes of this Act, once and not oftener, in each and every year, lay an equal and uniform tax

upon all property, real and personal, in said city; but said tax, added to the consolidated loan tax, and to the special tax for the payment of the annual interest on the bonds issued by the city for subscriptions to the stocks of the New Orleans, Opelousas and Great Western Railroad Company; the New Orleans, Jackson and Great Northern Railroad Company; and the Pontchartrain Railroad Company, shall not in the aggregate be more than one dollar and fifty cents on one hundred dollars of valuation, except in case of invasion or insurrection, provided it be sufficient to pay the interest on the consolidated debts and railroad bonds issued by the city of New Orleans." By Sec. 23 of Acts of 1856, page 141, (Leovy's Digest, page 155,) it is enacted, "That upon the first organization of the Common Council of the city of New Orleans, as herein provided, the city of New Orleans, as established by this Act, shall be vested with all the powers, rights, privileges and immunities incident to a municipal corporation, and necessary for the proper government of the same." These provisions of law seem to indisputably settle the fact, that it is made the duty of respondent to provide the means, by taxation yearly, to meet the interest; then it irresistibly and logically follows, that when the interest ceased, by the maturity of the bond, the city was bound to provide means to pay the principal, according to the stipulation in the bond. Hence relator deduces, that there was a power given to levy the tax by statute, and submits that the Court erred when it concluded dif-

ferently. Is there then, not here a refusal and failure on the part of the administrators of the city, to perform a ministerial act *clearly imposed* by law? Relator submits that there can be but one answer.

If relator is mistaken as to his rights; if the city can acquire, with bonds, stock in a railroad company, pledge it forever to the holders of the bonds; only pay punctually the interest therein for twenty years, then sell the pledged stock for $320,000, (which it spends,) and make no suitable provision for the return of the principal borrowed, and can be relieved by legislative or judicial interposition, from further consideration of its unquestioned and confessed liability, embodied in a solemn judgment of a Federal Court, then indeed, "chaos has come again," and the city of New Orleans has found "a new way to pay old debts."

We confidently anticipate that your Honors will forbid it.

We now refer to a case, decided by his Honor, the Chief Justice of the Supreme Court of the United States, on his circuit in South Carolina. It is hardly distinguishable from the one at bar, and is marked by so much directness and perspicuity, and so authoritative, that we embody it in full, and deem it conclusive.

"PARSONS *vs.* CITY OF CHARLESTON.—U. S. DISTRICT OF SOUTH CAROLINA, CIRCUIT COURT.

"The relator recovered a judgment in this court, November 19th, 1874, against the city of Charleston, upon cer-

tain over-due certificates of stock or bonds of the city, issued under the general powers of its charter, but without any special requirement or undertaking, either in the charter, ordinances or certificates for the levy of a tax to provide the means of payment. Execution has been issued upon the judgment, to which the Marshal returned, that he could find no property subject to said judgment and execution, except such as in public use." Payment of the judgment has been demanded of the city and refused. The City Council has also been requested to "levy a tax and provide for the collection of the same, to be applied to the payment of said judgment, principal, interest and costs," and this, too, has been refused. The city has no property subject to execution. This is an application for a writ of *mandamus*, requiring the city "to provide for the payment of the aforesaid judgment, by enacting an ordinance for the levying and collecting of a special tax to be paid out and applied for that purpose." The defence is in substance, that it is not the duty of the city to make such a levy, because no special provision for such a tax entered into the contract, upon which the judgment is predicated, and there is no power in the city to make the levy. The only question, therefore, presented for our consideration is, whether such a *mandamus* can issue without a provision for a specific tax, for the payment of the debt, either in the contract or in some statute of the State or ordinance of the city? The authority of the city to issue the stock, and become obliga-

ted for its payment, was conclusively settled by the judgment which has been rendered, and in which this Court followed the decisions of the highest court of South Carolina, in Copes *vs.* Charleston, 10 Rich. (Law.) 491; 3 Rich. (N. S.) 491.

The Supreme Court of the United States, at its last term, in Loan Co. *vs.* Topeka, 20 Wall., 660, held, that the power to contract a debt by issuing municipal bonds, or what is the same thing, municipal stock, carried with it, by necessary implication, the power to provide for the payment or redemption thereof, by the levy and collection of a tax, unless the contrary expressly appeared. The language of the Court is, "It is to be inferred, that when the legislature of a State authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation, which repels such an inference." To the same effect are Mad. Court House *vs.* Alexander, Walker, (Miss.,) 526; Lowell *vs.* City of Boston, 111 Mass., 460; Armstrong *vs.* Perkins, 43 Penn. St., 403, and Armstrong *vs.* Alleghany Co., 37 Penn. St,. 290. In the last case the objection was, as in this, that there was no authority to levy a tax, but the Court said, "The authority to create a debt, implies an obligation to pay it, and when no special mode of doing so is provided, it is also implied, that it is to be done in the ordinary way, by levy and collection of taxes."

tain over-due certificates of stock or bonds of the city, issued under the general powers of its charter, but without any special requirement or undertaking, either in the charter, ordinances or certificates for the levy of a tax to provide the means of payment. Execution has been issued upon the judgment, to which the Marshal returned, that he could find no property subject to said judgment and execution, except such as in public use." Payment of the judgment has been demanded of the city and refused. The City Council has also been requested to "levy a tax and provide for the collection of the same, to be applied to the payment of said judgment, principal, interest and costs," and this, too, has been refused. The city has no property subject to execution. This is an application for a writ of *mandamus*, requiring the city "to provide for the payment of the aforesaid judgment, by enacting an ordinance for the levying and collecting of a special tax to be paid out and applied for that purpose." The defence is in substance, that it is not the duty of the city to make such a levy, because no special provision for such a tax entered into the contract, upon which the judgment is predicated, and there is no power in the city to make the levy. The only question, therefore, presented for our consideration is, whether such a *mandamus* can issue without a provision for a specific tax, for the payment of the debt, either in the contract or in some statute of the State or ordinance of the city? The authority of the city to issue the stock, and become obliga-

ted for its payment, was conclusively settled by the judgment which has been rendered, and in which this Court followed the decisions of the highest court of South Carolina, in Copes *vs.* Charleston, 10 Rich. (Law.) 491; 3 Rich. (N. S.) 491.

The Supreme Court of the United States, at its last term, in Loan Co. *vs.* Topeka, 20 Wall., 660, held, that the power to contract a debt by issuing municipal bonds, or what is the same thing, municipal stock, carried with it, by necessary implication, the power to provide for the payment or redemption thereof, by the levy and collection of a tax, unless the contrary expressly appeared. The language of the Court is, "It is to be inferred, that when the legislature of a State authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation, which repels such an inference." To the same effect are Mad. Court House *vs.* Alexander, Walker, (Miss.,) 526; Lowell *vs.* City of Boston, 111 Mass., 460; Armstrong *vs.* Perkins, 43 Penn. St., 403, and Armstrong *vs.* Alleghany Co., 37 Penn. St,. 290. In the last case the objection was, as in this, that there was no authority to levy a tax, but the Court said, "The authority to create a debt, implies an obligation to pay it, and when no special mode of doing so is provided, it is also implied, that it is to be done in the ordinary way, by levy and collection of taxes."

The city of Charleston, has, by its charter, granted as early as 1783, "full power and authority to make such assessments on the inhabitants of Charleston, or those who hold taxable property, within the same, for the safety, convenience, benefit and advantage of said city, as shall appear to them prudent."

Art. ix, Sec. 8, of the present constitution of the State, adopted in 1868, provides that the corporate authorities of * * * cities * * * may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. And the General Assembly shall require that all the property, except that heretofore exempted, within the limits of municipal corporations, shall be taxed for the payment of debts contracted under the authority of law. Chap. xiv, R. S., provides, Sec. 1, "That all municipal corporations, created under, or by the laws of this State, and vested with power to lay and collect taxes, are authorized and required to assess all property, real and personal, within their corporate limits, at its actual value, and lay all taxes therein, at a uniform and equal rate." Sec. 2. "That all property, and no other, exempted from taxation by Sec. 6, of chap. 12, shall be exempted from taxation by municipal corporations."

Thus it will be seen, that there is no legislative limit upon the amount of money that may be raised by taxation in the city. Ample power is given to levy and col-

lect all that may be necessary to discharge the corporate obligations. And, as the General Assembly has provided, that all property, except that exempted by law, shall be taxed at a uniform and equal rate for *all* purposes, the constitutional requirements of uniformity, and the taxation of all property within the corporate limits, for the payment of debts, have been complied with. The new constitution did not make additional legislation necessary to authorize a tax to pay a lawful debt. That power has existed since 1783. All it did require, was, that provision should be made for placing the tax, when levied, uniformly, and with equality, upon all the property in the city. This has been done by the revised statutes.

We have, then, a case where the duty of the city to pay, has been established by a judgment of this Court, and where that duty can only be performed by the exercise of the power of taxation, which the city possesses. Upon demand made, it has refused to levy and collect the necessary tax. We are, therefore, called upon to determine whether the Court has the power, by its writ of *mandamus*, to enforce the performance of this duty, and thus give effect to its judgment.

The Supreme Court of the United States has many times so decided, Knox Co. *vs.* Aspinwall, 24 How. 376. Van Hoffman *vs.* Quincy, 4 Wall., 535. Benbow *vs.* Iowa City, 7 Wall., 313. Riggs *vs.* Johnson Co., 6th Wall., 166. U. S. *vs.* Keokuk, 6th Wall., 574. Supervisors *vs.* Durant, 9 Wall., 415–409.

The same court also held in Supervisors *vs.* U. S., 4 Wall., 435, that the writ could issue in cases where the power to tax was not specially conferred by the Act authorizing the contract, but by an independent statute subsequently passed in the following words: "The board of supervisors, under township organization, in such counties as may be owing debts, which the current revenue under existing laws, is not sufficient to pay, *may*, if deemed *advisable*, levy a special tax not to exceed in any one year one per cent. upon the taxable property in any such county, to be collected and kept as a separate fund and expended in liquidation of such indebtedness." So, too, in Galena *vs.* Amy., 5 Wall., 705, the writ was sustained, where the only specific authority for the tax was contained in the Act incorporating the city in force at the time the debt was contracted, and which provided that the City Council *might, if they believed the public good and the best interests of the city required it*, levy and collect an annual tax not exceeding one per cent. on a dollar on the assessed value of all estate, taxable in the city, in addition to all other taxes, the fund to be kept separate and annually, on the 1st Jan'y, paid over pro rata, upon the funded indebtedness of the city." In all these cases, particular taxes had been provided for to enable the corporate authorities to meet specific obligations. The taxes did not create the obligation. They only furnished the means by which it was to be met. The special provision for this levy and collection served to restrict, rather than

enlarge the corporate power of taxation for the payment of debts. As has been seen, *the authority to contract a debt carries with it the power to provide the means of payment by taxation if necessary.* If the power to make a contract is accompanied by a provision for special taxation to meet its obligations when made, such taxation may, under some circumstances, exclude all other. *But in the absence of any such restrictive provision, the general power of corporate taxation may as a rule be invoked.* In the present case, there is no restriction. The obligation to pay exists, and the power to tax for its discharge is included in the general power to tax for all corporate purposes. There is no legal necessity for a separation of funds. All moneys necessary to meet all obligations may be collected by one general tax and placed in one common fund. But while this power for a general levy exists, there is no prohibition against more specific levies. The city is, in express terms, authorized to make any and all regulations it may deem "requisite and necessary for its security, welfare and convenience;" and there seems to be no good reason why, if deemed necessary by the corporate authorities, taxation may not be classified, and one fund raised for poor purposes, another for the support of schools, another to pay the expenses of police, another for the payment of corporate debts, and so on to any extent that may be convenient or desirable. All this is left to the discretion of those who have for the time being, the official control of the city government. It is the special

duty of this city to raise money by taxation, and apply it when raised, to the payment of this judgment. It is not a matter of any importance to this relator, whether it is raised by general or specific tax, if it be in fact raised and applied. If therefore, upon the rule to show cause in this case, the city had returned that it had included this judgment in the estimates for current taxation and in good faith, either had levied or at the proper time, would levy a tax sufficient in the aggregate to meet this, with its other accruing and maturing obligations, such a return, if accompanied by assurances of a readiness and willingness to pay, when the collection should be made, might have been accepted as showing sufficient cause why the writ asked for, ought not now to issue. But this has not been done. On the contrary, the city having refused to levy a tax in any form for the payment of the judgment, insists that it is not in the power of the court to compel it to do so. This presents the issue. One of the offices of a writ of *mandamus* is to compel municipal corporations to perform their plain and positive duties. It may issue upon the application of one who has a clear right to require the performance of such a duty, if he has no other adequate remedy. There must exist both the right and the corresponding duty. Here, as we have seen, the relator has the right to require the levy and collection of a tax to provide the means for the payment of his judgment; and it is the duty of the city to do what he requires. Unless it is done, he is without remedy for the collection of his debt.

Therefore, a writ may rightfully issue to enforce the right by requiring the performance of the duty. This gives the relator the right to a writ requiring a tax to be levied which shall include provision for the payment of his judgment. It only remains to consider whether he is entitled to have so much of the tax as is intended for his benefit, separated from the general levy and set apart for his exclusive use. We cannot create new rights in favor of the relator, or confer new powers upon the city, but we can require the city to make use of any existing power it possesses adapted to the end to be accomplished. If it is not already in the power of the city to make a separate levy to pay this judgment, we cannot require it to be done. But if it is, we can. We have already shown, as we think, that the city has the power. Consequently, it is proper that a writ should issue requiring the separation to be made, in order that we may enforce the further order we are asked to make, directing the application of the money, when collected to the payment of the judgment. The prayer of the petition is granted. Waite, Chief Justice. Bond, Circuit Judge, concurring.

This case is so full, so authoritative, and so applicable to the case at bar, that it is superfluous to enlarge our brief by further citations. His Honor, Judge Woods, on the Alabama Circuit, in the case of Sibley *vs.* City of Mobile, in an able opinion, maintained the same views upon a similar state of facts, and cited the same authorities as in the Charleston case.

By the provision of the 15th section of Act No. 73 of 1872, of the Acts of the Legislature, (see Appendix,) the city was required to levy a tax to retire these bonds by purchase, in an attempt to "consolidate and provide for its bonded debt and floating indebtedness." If there were not other laws imposing on the respondents a duty to provide for their just liabilities, it would seem this Act is an answer to the question asked by Judge Billings: "Has the duty or power to levy this tax been committed by the Legislature to the city administration?" The right of the bondholders to this tax was declared "a vested right."

Judge Billings errs in another view, expressed in his reasoning. He says that the "Act pledges in perpetuity the stock," that is true; "that it gives the right to the bondholder to convert his bond into stock," that is also true; but he overlooks the important fact, that the Act limits that right to "*any time within ten years after the date of the bonds.*" It was a mere option, and the city hoped that the stock would be so valuable that it was to her interest to limit this option. Section 2 contemplates and furnishes no means of payment of the bond out of the stock *after* the expiration of ten years delay and Judge Billings, we submit mistakes or misstates its purport, (see also sec. 3.) The ordinance follows the Act, and sec. 3d of Ord. 1463, (Leovy's Digest, p. 426,) proves that the city anticipated the stock would pay large dividends and had "great expectations," out of which to pay the bonds, when they matured, or to hold the stock as the City of

Baltimore does its subscription to the Baltimore and Ohio Railroad as a good investment.

In the city of Waterton *ads.* Reese, 19 Wall., 117, this Honorable Court held, that,

"The appropriate remedy of the plaintiff was, and is a writ of mandamus. (See Riggs *vs.* Johnson county, 6 Wall., 193.) This may be repeated as often as the case requires. It is a judicial writ, a part of a recognized course of legal proceedings." The plaintiff had applied for a decree to enforce the judgment against any private property, but the Court held, "that to assume in this case, that the plaintiff is entitled to payment, and that the city has neglected its duty of taxation, does not authorize the Court to order appropriation of private property of a citizen, because the citizen has never been heard in court, and has had no opportunity to show defence against the claim itself, or an exemption as to his own property from liability on account of it; that the writ of mandamus is the ordinary and sufficient remedy at law, * * * and that "the legal remedy is adequate and complete, and time and the law must perfect its execution."

* * * * * *

In seeking to obtain for the plaintiff his just rights, we must be careful not to invade the rights of others. If an inhabitant of the city of Watertown should own a block of buildings of the value of $20,000, upon no principle of law could the whole of the plaintiff's debt be collected from that property. Upon the assumption that individ-

ual property is liable for the payment of the corporate debts of the municipality, it is only so liable for its proportionate amount. The inhabitants are not joint and several debtors with the corporation, nor does their property stand in that relation to the corporation or to the creditor. This is not the theory of the law, even in regard to taxation. The block of buildings, we have supposed, is liable to taxation only upon its value, in proportion to the value of the entire property, to be ascertained by assessment. There may be repeated taxes and assessments to make up delinquencies, but the principle or general rule of law is as we have stated.

The remedies for the collection of a debt, are essential parts of the contract of indebtedness, and those in existence at the time it is incurred, must be substantially preserved to the creditor. Thus, a statute prohibiting the taxing power by the city to raise money for the payment of these bonds, would be void. (Van Hoffman *vs.* City of Quincy, 4 Wall, 535) But it is otherwise of statutes which are in existence at the time the debt is contracted. Of these the creditor must take notice, and if all the remedies are preserved to him, which were in existence when his debt was contracted, he has no cause of complaint. (Cooley Const. Lim., 285, 287.)

And it was in this case your Honors lay down principles directly applicable to Judge Billings' views. Your Honors said: "Upon a class of defences interposed in the answer, and in the argument, it is not necessary to spend

much time. The theories upon which they are based are vicious. They are based upon the idea, that a refusal to pay an honest debt is justifiable, because it would distress the debtor to pay it. A voluntary refusal to pay an honest debt is a high offence in a commercial community, and is just cause of war between nations." And so "the remedies for the collection of a debt, are essential parts of the contract of indebtedness, and those in existence at the time it is incurred, must be substantially preserved to the creditor, 19 *Wall*, 121; 4 *Wall*, 535. "Thus a statute, prohibiting the exercise of its taxing power by the city, to raise money for the payment of these bonds, would be void." 4 Wall, 535. Although the *mandamus* asked for, was denied, Judges Swayne and Clifford dissented with emphasis, because they thought the effect of the decree below, if affirmed by the Supreme Court of the U. S., "will be to give judicial sanction to a fraudulent repudiation of an honest debt."

Judge Billings treats these obligations of the city as though they were not unconditional and absolute promises to pay a certain sum of money, at a fixed period, to the holder, to be met by the exercise of its taxing power. He fails to discover the existence of any law to authorize their payment at maturity, notwithstanding he had before him, the statutes and ordinances providing, rigorously, for the interest, semi-annually, up to the day of maturity. He treats this obligation as though it contained a stipulation, that the holder had agreed to take stock in the

By the provision of the 15th section of Act No. 73 of 1872, of the Acts of the Legislature, (see Appendix,) the city was required to levy a tax to retire these bonds by purchase, in an attempt to "consolidate and provide for its bonded debt and floating indebtedness." If there were not other laws imposing on the respondents a duty to provide for their just liabilities, it would seem this Act is an answer to the question asked by Judge Billings: "Has the duty or power to levy this tax been committed by the Legislature to the city administration?" The right of the bondholders to this tax was declared "a vested right."

Judge Billings errs in another view, expressed in his reasoning. He says that the "Act pledges in perpetuity the stock," that is true; "that it gives the right to the bondholder to convert his bond into stock," that is also true; but he overlooks the important fact, that the Act limits that right to "*any time within ten years after the date of the bonds.*" It was a mere option, and the city hoped that the stock would be so valuable that it was to her interest to limit this option. Section 2 contemplates and furnishes no means of payment of the bond out of the stock *after* the expiration of ten years delay and Judge Billings, we submit mistakes or misstates its purport, (see also sec. 3.) The ordinance follows the Act, and sec. 3d of Ord. 1463, (Leovy's Digest, p. 426,) proves that the city anticipated the stock would pay large dividends and had "great expectations," out of which to pay the bonds, when they matured, or to hold the stock as the City of

Baltimore does its subscription to the Baltimore and Ohio Railroad as a good investment.

In the city of Waterton *ads.* Reese, 19 Wall., 117, this Honorable Court held, that,

"The appropriate remedy of the plaintiff was, and is a writ of mandamus. (See Riggs *vs.* Johnson county, 6 Wall., 193.) This may be repeated as often as the case requires. It is a judicial writ, a part of a recognized course of legal proceedings." The plaintiff had applied for a decree to enforce the judgment against any private property, but the Court held, "that to assume in this case, that the plaintiff is entitled to payment, and that the city has neglected its duty of taxation, does not authorize the Court to order appropriation of private property of a citizen, because the citizen has never been heard in court, and has had no opportunity to show defence against the claim itself, or an exemption as to his own property from liability on account of it; that the writ of mandamus is the ordinary and sufficient remedy at law, * * * and that "the legal remedy is adequate and complete, and time and the law must perfect its execution."

* * * * * *

In seeking to obtain for the plaintiff his just rights, we must be careful not to invade the rights of others. If an inhabitant of the city of Watertown should own a block of buildings of the value of $20,000, upon no principle of law could the whole of the plaintiff's debt be collected from that property. Upon the assumption that individ-

ual property is liable for the payment of the corporate debts of the municipality, it is only so liable for its proportionate amount. The inhabitants are not joint and several debtors with the corporation, nor does their property stand in that relation to the corporation or to the creditor. This is not the theory of the law, even in regard to taxation. The block of buildings, we have supposed, is liable to taxation only upon its value, in proportion to the value of the entire property, to be ascertained by assessment. There may be repeated taxes and assessments to make up delinquencies, but the principle or general rule of law is as we have stated.

The remedies for the collection of a debt, are essential parts of the contract of indebtedness, and those in existence at the time it is incurred, must be substantially preserved to the creditor. Thus, a statute prohibiting the taxing power by the city to raise money for the payment of these bonds, would be void. (Van Hoffman *vs.* City of Quincy, 4 Wall, 535) But it is otherwise of statutes which are in existence at the time the debt is contracted. Of these the creditor must take notice, and if all the remedies are preserved to him, which were in existence when his debt was contracted, he has no cause of complaint. (Cooley Const. Lim., 285, 287.)

And it was in this case your Honors lay down principles directly applicable to Judge Billings' views. Your Honors said: "Upon a class of defences interposed in the answer, and in the argument, it is not necessary to spend

much time. The theories upon which they are based are vicious. They are based upon the idea, that a refusal to pay an honest debt is justifiable, because it would distress the debtor to pay it. A voluntary refusal to pay an honest debt is a high offence in a commercial community, and is just cause of war between nations." And so "the remedies for the collection of a debt, are essential parts of the contract of indebtedness, and those in existence at the time it is incurred, must be substantially preserved to the creditor, 19 *Wall*, 121; 4 *Wall*, 535. "Thus a statute, prohibiting the exercise of its taxing power by the city, to raise money for the payment of these bonds, would be void." 4 Wall, 535. Although the *mandamus* asked for, was denied, Judges Swayne and Clifford dissented with emphasis, because they thought the effect of the decree below, if affirmed by the Supreme Court of the U. S., "will be to give judicial sanction to a fraudulent repudiation of an honest debt."

Judge Billings treats these obligations of the city as though they were not unconditional and absolute promises to pay a certain sum of money, at a fixed period, to the holder, to be met by the exercise of its taxing power. He fails to discover the existence of any law to authorize their payment at maturity, notwithstanding he had before him, the statutes and ordinances providing, rigorously, for the interest, semi-annually, up to the day of maturity. He treats this obligation as though it contained a stipulation, that the holder had agreed to take stock in the

railroad, in payment of the principal, whereas, this clause in the statute, the ordinance, and the bond, made it a *mere option*, limited *to ten years* from its date. He thinks and says, that the payee in the bond, viz. The railroad company, meant to look to the stock and its dividends, exclusive of taxation, for ultimate payment of the principal of the debt, although it might look to taxation to pay accruing interest, up to maturity, and therefore he could find no law imposing any duty upon the administrators, to levy and collect any special or specific tax to pay relator's judgments. To all which, we reply that Judge Billings errs in all his premises, and is, therefore, wrong in his conclusions. The power to tax to pay the interest, combines and presupposes the same power to pay the capital at maturity. No railroad would have sold its stock in that way, and *guaranteed* that its value and its dividends would ultimately pay the subscription, else to be uncollectable, as an ordinary debt, like any other promise to pay. "A grim smile would have played over the face of any railroad director, to have been told that he was so verdant."

In conclusion, our contention is, that the City of New Orleans, having legally issued her bonds in exchange for railroad stock, became, at their maturity, obliged to provide by taxation for their payment. For that purpose the laws were unchanged which were in force when the original subscription in 1852, called for payment by six annual installments, to be gathered by a special tax on

landed estate, *in lieu* of which these bonds were substituted in 1854. Therefore, as such was the legal relation of the city towards its creditor, the obligee in the bond, the relator as assignee, is legally subrogated to all the transferrer's rights and remedies for their enforcement. Here then, relator has a *clear right*, and there rests upon respondent, a *resulting and corresponding duty*. If he be refused a mandamus, then he is remediless, and will be deprived of "due process" to enforce his judgments; and his sad experience will be that there is little justice and no equity in "the laws of the land." We submit, finally, that the authorities quoted, establish conclusively, that the decree pronounced herein, is erroneous, and that the demurrer should be sustained; and we respectfully ask for a reversal of the judgment rendered, and for all proper directions to the lower court to carry out and enforce the legal obligations of respondent, and for such other orders as are meet and proper in the premises.

All which is respectfuliy submitted.

LABATT, ARONI & CLINTON,

Of Counsel for Relator.

AUTHORITIES AND REFERENCES

To Acts and Ordinances touching Creation of the Debt and Validity of the Bonds.

1st. Act March 12th, 1852, authorizing City to subscribe, see Act 1852, p. 128 and 129. Sec. 1 of Act March 12, 1852, provides, "that it shall be lawful for police juries and municipal corporations to subscribe to the stock of corporations undertaking works of internal improvement under the laws of this state on complying with the provisions of this Act." *Act No.* 175, *p.* 128 *and* 129, and *Act in full in* 8*th A. R., p.* 352, *McDonogh Case.*

2d. Ordinance No 37, providing for subscription, app'd May 17th, 1852. (appendix.)

3d. Act providing for subscription by City, see Acts 1854, p. 72. (appendix.)

4th. Ordinance No. 1463, providing for subscription and issue of Bonds, Leovy's Digest, p. 426–7. (appendix.)

5th. Extract from Act No. 73 of 1872. (appendix.)

6th. Extracts from decisions of Supreme Court of La. (appendix.)

7th. Decision of Judge Woods on the Alabama Circuit. (appendix.)

The Legislature has repeatedly Ratified these Bonds.

1st. By City Charter of 1856.—Acts 1856, p. 147, 148.

2d. By City Charter of 1870.— Act 1870, (extra session,) No. 7.

3d. By Act 1872, p. 127, sec. 15. (appendix.)

The City has repeatedly ratified them in and out of court.

1st. By its pleadings and confessions in all the courts.

2d. By payment of interest for 20 years and by ordinances passed every year for levy of taxes to pay said interest

3d. By funding some and agreeing to fund the rest when presented in Premium Bonds, under Act of Legislature of 1876.

The Taxpayers have repeatedly ratified them.

1st. By standing by and acquiescing in their issue and voting for the ordinance.

2d. By submitting to taxation for 20 years to pay interest and by funding them

See, also, Dillon on Municipal Corporations, §424.

2 South Law Review, (Dillon on Mun Bonds,) p 484

City *vs.* Lamson. 9 Wall, 485.

Thomson *vs.* Lee, 3 Wall, 327.

St. Joseph *vs.* Rogers, 16 Wall, 664.

The Doctrine of Estoppel applies to the State and to Municipalities, as well as individuals. State *vs.* Taylor 28 Annual La. R., p. 460.

29th Conn. 175, Savings Bank *vs.* New London.

APPENDIX.

For Act authorizing subscription, see Act March 12, 1852, providing for the subscription by the parishes and Municipal Corporations of this state to the stock of corporations undertaking works of internal improvement, and for the payment and disposal of stock so subscribed, *8th Annual R.*, 341, 10 *A*, 762, 15 *A.* 123.

Ordinance, No. 37, *Approved May* 17*th*, 1852.

AN ORDINANCE PROVIDING FOR THE SUBSCRIPTION BY THE CITY OF NEW ORLEANS TO THE STOCK OF THE NEW ORLEANS, JACKSON AND GREAT NORTHERN RAILROAD COMPANY.

1st. That the City of New Orleans subscribe to the stock of the New Orleans, Jackson and Great Northern Railroad Company, shares to the number of Eighty Thousand, amounting to two millions of dollars, one-sixth of this tax, being one-half of one per cent., shall be payable on the first Monday of May, 1853, and another sixth on the first Monday of May of every subsequent year, *until the amount of the subscription is obtained.*

2d. That a tax of three per cent. is hereby levied on all the landed estate situated in the City of New Orleans,

said tax being sufficient to pay the amount of said subscription. One-sixth of this tax being one-half per cent., shall be payable on the first Monday of May, 1853; another sixth on the first Monday of May, 1854; another sixth on the first Monday of May, 1855; another sixth on the first Monday of May, 1856; another sixth on the first Monday of May, 1857; and the remaining sixth on the first Monday of May, 1858.

Said taxes shall be payable at the office of the City Treasurer, and shall be collected in same manner as all other city taxes, according to the provisions of the 35th section of the law consolidating the City of New Orleans.

3d. Separate receipts for the tax shall be given to the tax payers which shall entitle them to an equivalent amount in stock of the Railroad Company, and whenever the amount of the tax receipts shall not correspond exactly with the amount of a share or any number of shares in the Railroad Company, it shall be lawful for the holder of the receipt to complete the fraction to an amount equivalent to a share by payment in cash of the deficiency.

4th. It shall be the duty of the City Treasurer to pay over to said Railroad Company, through its proper officers, on every Monday, the amount of the railroad tax aforesaid, collected during the next preceding week,

accompanied by a list of the names of the persons who have paid the tax, and of the amount paid by each.

5th. This ordinance shall not take effect, nor shall an election be held for the purpose of submitting it to the approval of the tax payers, as required by law, until the Board of Directors of said Railroad Company shall have communicated in writing, to the Common Council, their consent to accept the subscription herein ordained, payable in the manner herein above set forth.

Whereas: It has been satisfactorily ascertained that without the aid of the property holders, the New Orleans, Jackson and Great Northern Railroad cannot be constructed to a successful issue; that the real estate interest receives the paramount advantage caused by such public works, and consequently such interests ought to aid this important undertaking; and although some large property holders have made handsome subscriptions, yet the great bulk of subscribers to the above named road are men of limited means and mechanics, the bone and sinew of the community; and

Whereas: Although the majority of real estate owners have not made voluntary subscriptions on the books of the company, yet they are almost unanimous in the belief that a tax must be levied, and many are anxious to pay it, confident in the belief that the tax will not only advance property, but that they will receive for the

tax paid a dividend paying stock that will not be surpassed in the world, therefore be it

Resolved: That the Mayor is hereby authorized and directed to order an election in conformity to the above ordinance, to take place on the Third Monday in June next, and to make complete returns of said election within ten days from the opening or closing of the polls.

SIGNED: FRANS ALPUENTE,
Pres't Board of Ass't Aldermen.
" W. C. C. CLAIBORNE,
Pres't Board of Aldermen.

Approved May 17th, 1852.

A. D. CROSSMAN, *Mayor.*

I certify the foregoing to be a true copy of ordinance, No. 37, Approved May 17th, 1852, as per Records on file.

ANDREW J. BACON,
Ass't Sec'y City Council.

No. 109.

AN ACT,

(*Approved March* 15th, 1854)

FOR THE SUBSCRIPTION BY THE CITY OF NEW ORLEANS TO THE STOCK OF THE NEW ORLEANS, JACKSON AND GREAT NORTHERN RAILROAD COMPANY.

Common Council authorized to subscribe to the capital stock of the New Orleans, Jackson and Great Northern Railroad Company in a sum not exceeding $2,000,000.

SECTION 1. Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened, that it shall be lawful for the Common Council of the City of New Orleans to subscribe to the stock of the New Orleans, Jackson and Great Northern Railroad Company, in a sum not exceeding two millions of dollars.

Provisions to be contained in any ordinance authorizing any subscription to the stock of said company.

SECTION 2. Be it further enacted, &c. that any ordinance authorizing such subscription, shall contain the following provisions, to wit:

1st. A statement of the number and amount of shares for which the City subscribes.

2d. That the subscription of the City shall be made by the Mayor, and shall be payable in bonds of said City for one thousand dollars each, having twenty years to run, bearing interest at the rate of six per cent. per annum, with interest coupons attached, payable semi-annually in New Orleans, or New York, as the Company entitled to receive them may prefer,

transferable by the endorsement of the President and Secretary of said Company, and convertible into the stock of said Company, at the option of the holder, at any time within ten years after their date.

3d. That a special tax on real estate and slaves shall be levied in January of each year, sufficient to pay the annual interest on said bonds, specifying the rates of said tax, which shall be collected at the same time, and in the same manner as the consolidated loan tax of said city; and all ordinances, resolutions or other acts passed by said Council after the first day of January in each year, except an ordinance to impose said consolidated loan tax, and an ordinance to impose a tax for the payment of interest on bonds, which may be hereafter issued for subscription to the New Orleans, Opelousas and Great Western Railroad Company, shall be null and void, unless a resolution imposing a special tax for the payment of the interest on said bonds issued to the Railroad Company herein named, shall have been previously passed; provided that no levy of a tax for the payment of interest on said bonds shall be made after the payment of dividends of six per cent. per annum on the stock of said Company held by the City, as hereinafter provided, which dividends shall be applied by the City to the payment of the interest; and provided, further, that whenever the dividends on said Railroad Stock of the City shall amount to more than six per cent. per annum, the excess, after the payment of interest, shal be applied to the purchase of the city bonds issued

under the provisions of this Act; it being understood that when dividends for less than six per cent. per annum are received on the Railroad stock of the City, a tax for interest shall be levied for the difference only between the amount of said annual dividends and the amount of the annual interest.

4th. That immediately after the passage of the ordinance authorizing the subscription, and its approval by the voters of the City, as hereinafter provided, the Mayor shall cause bonds to be issued to said Railroad Company for a percentage of the City subscription equal to the percentage which may have been previously called by the Board of Directors of Railroad Company, on the subscription of private stockholders in the City of New Orleans; and thereafter that he shall cause bonds to be issued to said Company for the same percentage that may be demanded from private stockholders, under any subsequent call of said Board.

5th. A repeal of an ordinance of the Common Council of New Orleans, approved May seventeenth, One-thousand-eight-hundred-and-fifty-two, entitled "An Ordinance providing for the subscription by the City of New Orleans to the stock of the New Orleans, Jackson and Great Northern Railroad Company;" provided the repeal of said Ordinance shall not be so construed as to relieve the City from the liability to collect and pay over to said Railroad Company that portion of the Railroad tax imposed under said ordinance for the

year Eighteen-hundred and Fifty-Three, which has not yet been collected and paid over to said Company.

City Bonds to be received by the Railroad Company at par value.

Certificates of stock to be issued to the City.

Stock to remain pledged for the redemption of said bonds.

Manner of converting said bonds into stock of Railroad Company.

SECTION 3. Be it further enacted, &c. that the City Bonds issued to said Railroad Company. shall be received by it at par value, and said Railroad Company shall issue to the City of New Orleans, therefore, certificates of stock for an amount equal to the amount of the bonds received; and the stock of the said Company, thus issued to the City of New Orleans, shall remain forever pledged for the redemption of said bonds; provided, however, that any holder of said bonds who may desire to convert them into the capital stock of the company to which they may have been issued, shall, on application to the Treasurer of said City, and on surrender to him of the bonds to be converted, receive from said Treasurer a transfer of the stock represented by the bonds surrendered, and said bonds shall be immediately cancelled.

Manner of submitting any ordinance subscribing for stock, passed by the Council, to the voters for their approval.

SECTION 4th. Be it further enacted, &c., that no ordinance passed by the Common Council, in conformity with this Act, shall be valid or take effect until it shall have been approved and ratified at

an election to be held for that purpose by order of the Common Council, by a majority of the voters of the City, who have the right, under existing laws, of voting at City elections, said elections shall take place within fifteen days after the passage of the ordinance, be preceeded by a public notice of ten days, to be published by the Mayor in two or more of the City newspapers, and shall, in all respects, when not herein otherwise provided, be conducted in the manner prescribed by law for City elections; provided, that if the Common Council refuse to subscribe to the stock of the Railroad Company herein named, in the manner set forth in this Act, it shall be lawful at any subsequent period, and as often as the Council may deem proper, at intervals of not less than two months, for said Council to reconsider the question; and should the ordinance, when finally passed by the Council, be rejected by a vote of the majority of the duly qualified voters of the City when first presented to them for ratification, the Council may, at any subsequent period, and as often as they may deem proper, cause the sense of the voters again to be taken, in the same manner as at the first election, at intervals of not less than two months.

Consent of Directors required prior to the passage of any ordinance in conformity with this Act.

SECTION 5th. Be it further enacted, &c., that no ordinance passed by the Common Council, in conformity with this Act, shall be submitted for ratification to the voters who have the right by

law to vote at City elections, until the Board of Directors of said Railroad Company shall have notified the Mayor in writing of their consent to accept said ordinance; provided their acceptance of the ordinance, before it shall have been submitted to the voters of the City, shall be null and void, in the event of the rejection of the ordinance by said voters.

Certain bonds to be cancelled, before the bonds authorized by this Act shall be delivered to the Company.

SECTION 6th. Be it further enacted, &c., that any bonds which may have been issued by said Railroad Company, and secured by a pledge of the Railroad tax for the year one-thousand-eight-hundred and fifty-four, one-thousand-eight-hundred and fifty-five, one thousand-eight-hundred and fifty-six, one-thousand-eight- and fifty-seven, or one-thousand-eight-hundred and fifty-eight, levied under the ordinance of the Council referred to in the second section of this Act, and approved May seventeenth, one-thousand eight-hundred and fifty-two, shall be cancelled by the Company which issued the same, before said Company shall receive from the City any of the bonds authorized to be delivered for subscription to the stock of said Company. by virtue of this Act; or if said Company prefer, they shall have the right to deposit in the Louisiona State Bank, an amount in

Deposit of cash authorized, instead of cancelling bonds.

cash sufficient to pay said bonds, so secured by a pledge of the Railroad tax, and the interest on said bonds until their maturity; and on the exhibition to the Mayor of the Railroad tax bonds cancelled by the Company, and a certificate from the Cashier of said Bank, showing the amount of cash specially deposited for the redemption of the Railroad tax bonds not cancelled, and the interest thereon, until maturity, the Mayor shall, if satisfied that the whole of the bonds of the Company, secured by a pledge of the Railroad tax, have been cancelled or provided for by a deposit in the manner herein directed, deliver the City bonds to which said Company may be entitled on account of the subscription of the City.

Election of Directors by the Common Council, their term of service

Who shall not be eligibel as Directors.

When and how the Council shall cease to elect Directors of said Company.

SECTION 7th. Be it further enacted, &c., that the Common Council shall in the month of May of each year, elect by joint ballot, three citizens of New Orleans as Directors of the New Orleans, Jackson and Great Northern Railroad Company, who shall serve as such for one year, or until their successors shall be elected; provided no member of either Board of the Common Council, or officer of the Corporation, shall be eligible as a Director; and provided, further, that on the conversion into stock of one-third of the bonds issued to said Company by the City, the Common Council

shall elect but two Directors in said Company; when two-thirds of said bonds shall have been ccnverted, the Council shall elect but one Director; and when the whole of said bonds shall have been converted, the Council shall no longer elect any Directors.

When this Act goes into effect.

SECTION 8th. Be it further enacted, &c., that this Act shall take effect and be in force from and after its passage.

JNO. M. SANDIDGE,
Speaker of the House of Representatives.

ROBERT C. WICKLIFFE,
President pro. tem. of the Senate.

Approved, March 15th, 1854.

P. O. HEBERT,
Governor of the State of Louisiana.

A true copy.

ANDREW S. HERRON,
Secretary of State.

EXTRACT FROM OF THE ACTS OF LA. 1872—No. 73. ENTITLED, "TO CONSOLIDATE, LIMIT AND PROVIDE FOR THE DEBT OF NEW ORLEANS" AND OTHER PURPOSES. APPROVED APRIL 26TH, 1872.

SECTION 14. Be it further enacted, &c., that within the months of November and December, 1872, and annually thereafter; the Council shall adopt estimates of receipts and expenditures, (the latter including police and excluding schools) for the ensuing year. The estimate of expenditures shall not be finally adopted until one week shall have elapsed after final adoption of the estimate of revenues and it shall not exceed the same.

Receipts and Expenditures.

SECTION 15th. Be it further enacted, &c., that the Council, after the adoption of the estimate, shall proceed to levy the annual taxes required, to wit:

1st. The City debt tax, which shall be based upon the detailed estimate of the sinking funds and interest falling due. *For all bonds for which no other retiring provisions exists by law, an estimate shall be included of not less* than two nor more than ten per cent. of the face of the bonds outstanding *of any of the several issues*, which shall be applied to the retiring of bonds offered at the most advantageous rates, no bid to be accepted higher than par, and the right reserved to reject all bids. No limit other than herein laid down shall apply to this tax, *which is hereby declared a vested right of the bondholders interested.*

ORDINANCE, No. 1463.

Levy's Dig. p. 426.

AN ORDINANCE PROVIDING FOR THE SUBSCRIPTION, BY THE CITY OF NEW ORLEANS, TO THE CAPITAL STOCK OF THE NEW ORLEANS, JACKSON AND GREAT NORTHERN RAILROAD COMPANY.

City Subscription

ART. 938. (1.) Be it ordained by the Common Council of the City of New Orleans, that the Mayor subscribe, on behalf of said City, for eighty thousand shares, of twenty-five dollars each, of the capital stock of the New Orleans, Jackson and Great Northern Railroad Company, amounting to two millions of dollars.

How payable.

ART. 939. (2.) Be it further ordained, that said subscription shall be payable in bonds of the City of New Orleans, for one thousand dollars each, having twenty years to run, bearing interest at the rate of six per cent. per annum, with interest coupons attached, payable semi-annually in New Orleans or New York, as said Railroad Company may prefer, *transferable by the endorsement of the President and Secretary of said company, and convertible into the stock* of said company, at the option of the holder. at any time within ten years after their date.

Special tax on Real Estate, etc.

ART, 940. (3.) Be it further ordained, that a special tax on real estate and slaves shall be levied in January of each year, sufficient to pay the annual interest on said bonds, specifying the

rate of said tax, which shall be collected at the same time, and in the same manner, as the consolidated loan tax of said City; and all ordinances, resolutions, or other acts passed by this Council after the first day of January in each year, except an ordinance to impose said consolidated loan tax and an ordinance to impose a tax for the payment of interest on bonds which may hereafter be issued for subscription to the New Orleans, Opelousas and Great Western Railroad Company, shall be null and void, unless a resolution imposing a special tax for the payment of the interest on the bonds issued to the New Orleans Jackson and Great Northern Railroad Company shall have been previously passed. Provided, that no levy of a tax for the payment of interest on said bonds shall be made after the payment of dividends of six per cent. per annum on the stock of said company, held by the city, which dividends shall be applied by the city to the payment of the interest. And provided further, that whenever the dividends on said Railroad stock of the city shall amount to more than six per cent. per annum, the excess, after the payment of interest, shall be applied to the purchase of the city bonds issued under the provisions of this ordinance; it being understood, that when dividends for less than six per cent. per annum are received on the Railroad stock of the city, a tax for interest shall be levied for the difference only between the amount of the said annual dividends and the amount of the annual interest.

How bonds delivered

ART. 941. (4.) Be it further ordained, that immediately after the passage of this ordinance, and its approval by the voters of the City, as hereinafter provided the Mayor shall cause bonds to be issued to said Railroad Company for a percentage of the City subscription, equal to the percentage which may have been previously called by the Board of Directors of said Railroad Company, on the subscriptions of private stockholders in the City of New Orleans, and, thereafter, he shall cause bonds to be issued to said company for the same percentage that may be demanded from private stockholders, under any subsequent call of said board.

Repeal of certain ordinances.

ART. 942. (5.) Be it further ordained, that an ordinance approved May 17th, 1852, entitled "An ordinance providing for the subscription by the City of New Orleans to the stock of the New Orleans, Jackson and Great Northern Railroad Company," be, and the same is hereby repealed, provided the repeal of said ordinance shall not be so construed as to relieve the City from the liability to collect and pay over to said Railroad Company that portion of the Railroad tax imposed under said ordinance, payable in the year one-thousand eight-hudred and fifty-three, which has not yet been collected and paid over to said Company.

Ratification of this ordinance.

ART. 943. (6.) Be it further ordained, that within fifteen days after the passage of this ordinance, and after ten days' notice in two or more of the City newspapers, to be given by the Mayor, and on a day within the said fifteen days to be specified in said notice by said Mayor, an election shall be held for the approval and ratification or rejection of this ordinance by the voters of the City of New Orleans, who have the right, under existing laws, of voting at City elections, said election to be conducted in the manner prescribed by law for City elections. At said election the voters who may be in favor of approving and ratifying this ordinance shall write or print on their ballots the words "For the Ordinance," and those who are opposed to said ordinance shall write or print on their ballots the words "Against the Ordinance." Provided, the Board of Directors of said Company shall notify the Mayor, in writing, before the publication of the notice of election, of their consent to accept said ordinance; and provided further, that the provisions of this ordinance for a subscription to the stock of the said New Orleans, Jackson and Great Northern Railroad Company, shall not be valid until this ordinance shall be ratified by a majority of the votes cast at the election herein ordered.

Extract from the Decisions of Supreme Court, of Louisana.

1. "The Act of March 12th, 1852, "providing for the subscription by the parishes and municipal corporations of this State to the stock of corporations undertaking works of internal improvement, and for the payment and disposal of stock so subscribed," is constitutional. The restrictions imposed by articles 108 and 109 of the Constitution of 1852, upon the aid which the State may grant to corporations for internal improvements, is no limitation upon the aid which the legislature may authorize the police juries, etc., to grant. The burded imposed under the Act of 1852 is a tax, etc. The power of taxation, and that of taking private property for public use, are distinct things; in the latter case, previous compensation must be made; in the former, though in taking a man's money you do take his property, the compensation is considered as simultaneously given in the benefit which, as a citizen, he enjoys in common with his fellow citizens, in the public welfare and the public prosperity, to the advancement of which the money is to be applied. The provision in the Act that the contribution levied shall entitle the contributor to stock in the corporation, cannot be regarded as a grievance, and in no respect changes its character as a tax."—8 *Ann.* 341.

"The assessment by the city authorities, on account of the subscription to Railroad stock, and for the consolidated loan tax is essentially a tax.—10 *Ann.* 762. The 117th section of the Act of 1856, which was intended to amend an Act entitled "An Act to consolidate the City of New Orleans, and to provide for the government of the City of New Orleans, and the administration of the affairst hereof," contemplated that the special Railroad tax should be levied after the assessment roll was completed.',—15 *Ann.* 123.

Decision of Judge Woods.

HIRAM SIBLEY, ET AL.
vs.
CITY OF MOBILE.

HIS HON. JUDGE WOODS,
Circuit Judge.

—o—

"The Act of the Legislature of Jany. 17, 1870, conferred ample authority upon the City of Mobile to issue the Bonds from which the coupons of Relators have been detached, and even without express authority to that effect, implied authority to levy a tax for their payment.—See *Toyeka*, 20 *Wall*, 36, 36 *Ala.* 439, 45 *Ala.* 730, 2 *Woods*, 230.

Besides the implied power, there is an express agreement on the part of the City, set out in the ordinance of June 25th, 1869, and afterwards, ratified by the Legislature, by the Act of Jany 17th, 1870, by which the City bound itself to appropriate sufficient money from the treasury to pay the interest, and reserved to itself the right to raise the same by special tax, which remedies were also approved by the same Act of Legislature. The City acted upon this authority, and as its

answer shows, for several years levied a special tax to pay the interest on the bonds issued to the Mobile and Alabama G. T. R. R. Company. The authority to levy a tax for the payment of the interest on these bonds carries with it the duty to make the levy. *The power to levy the Tax, is in the nature of a trust for the benefit of the holder of the Bonds.* The right of the crditor and the ends of justice demand that it shall be exercised in favor of affirmative action, and the law requires it.—City Galena *vs.* Amy, 5 *Wall* 780, *High on Ext. Rem.* §397. 4 *Wall* 334, Supervisors *vs.* U. S.

When the bonds which Relator holds were issued, the law authorized, and in effect, required the levy of a tax to pay the interest thereon as it accrued. This law formed a part of the contract as much as if it had been written on the face of the bonds.—1 *Wall* 175, 4 *Wall* 417, 15 *Wall* 610, 48 *Ala.* 446, 2 *Woods* 641.

The City of Mobile, by its ordinance, confirmed by Act of the Legislature, has agreed to pay the interest on these bonds semi annually, either out of the general revenue, or by special tax. This contract is, of course, subject to the constitutional limit upon the taxing power of the City restricting it to a levy, not to exceed two per cent. per annum. The question is, therefore, presented by the demurrer to the answer, whether it was competent for the Legislature, by an Act passed subsequent to the issue of these bonds, to exhaust all the taxing power of the City, and direct its application of the proceeds of such taxation to other objects, to the ex-

clusion of the issue of bonds of which relator holds a part. After authorizing the City to issue these bonds, and after approving the contract of the City to pay the interest semi-annually, either by a general or a special tax, can the Legislature authorize and direct that all the taxing power of the City shall be exercised for the benefit of the holders of other bonds, to the exclusion of these? In my judgment, such an act would be a violation of the rights of the holders of the bonds thus excluded, and an impairement of their contract with the City of Mobile. These bondholders are entitled to have all the taxing power of the City within the constitutional limit exercised, if necessary, to secure the performance of the contract made by the City with them. When the power is exercised the current expenses of the City must be paid out of the funds so raised, and as to the residue, the relators are entitled to share *prorata* with the other creditors of the City, and neither the City nor the Legislature have the power to appropriate the taxing power of the City for the exclusive benefit of a class, while the relators have a contract in effect, declaring that a part of the taxing power of the City shall be exercised for their benefit. It appears from the answer of respdt, that large sums are due the holders of bonds issued under the the Acts of 1843 and 1859 for unpaid interest and the answer avers that if the sums are paid, and also the sums required by act of 1875, the taxing power of the City for the current year will be exhausted. But there is no aver-

ment that it is the purpose of the City to levy any tax to pay the past due interest referred to, and excluding taxation for such purpose, it appears that the City will not exceed its powers to tax, if it should levy a sufficient sum to satisfy the judgment of relators. The City cannot protect itself from its obligation, founded on its own contract to levy the tax by showing that it has failed in former years to do its duty by its creditors and allowed interest to accumulate, while, at the same time, it expresses no purpose to levy a tax to pay such interest due and unpaid. In my judgment the facts set forth in the answer of the City of Mobile constitute no reason why the writ of mandamus asked for should not issue. The demurrer to the answer is sustained."

NOTE. In the case at Bar, the legislat~~ion~~ure has by the "Premium Bond" legislation for the City of New Orleans attempted to do what Judge Woods says is illegal *quoad* Relators bonds, viz: prohibited the City from levying taxes to pay them, under which legislation, respondents aver the non-existence of the taxing power for that purpose.

LABATT, ARONI & CLINTON,

Of Counsel.

U. S. SUPREME COURT.

THE UNITED STATES, EX. REL., MORRIS RANGER,
VS. {No. 150.
THE CITY OF NEW ORLEANS.

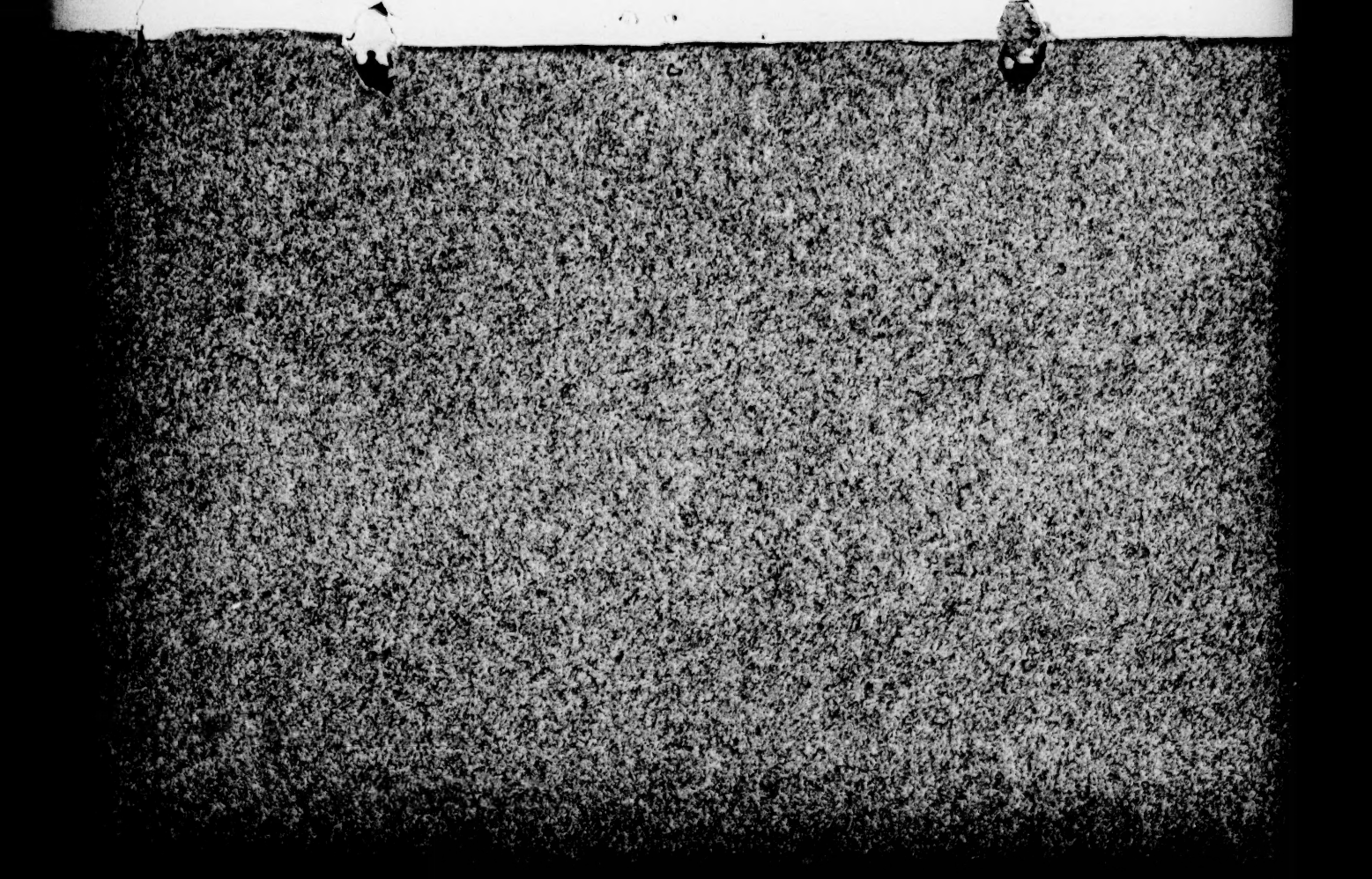
THE UNITED STATES, EX. REL., PARSONS,
VS. {No. 157.
THE SAME.

THE UNITED STATES, EX. REL., PETERKIN,
VS. {No. 188.
THE SAME.

THE UNITED STATES, EX. REL., WADDICK,
VS. {No. 189.
THE SAME.

Defendant's Brief.

L. Graham, Brief Printer, 127 Gravier st.



UNITED STATES SUPREME COURT.

No. 150.

THE UNITED STATES Ex Rel., MORRIS RANGER

vs.

THE CITY OF NEW ORLEANS.

Brief for Defendant.

STATEMENT OF FACTS:

In 1854, the City of New Orleans was authorized by act of the Legislature of Louisiana to subscribe for the stock of the New Orleans, Jackson and Great Northern Railroad Company, in a sum not exceeding two millions of dollars, and to issue bonds of the City in payment of the stock subscription, the bonds to be of one thousand dollars each, having twenty years to run, bearing six per cent. interest per annum with interest coupons attached. The act made provision up to a certain period, for the payment of the interest upon the bonds, by means of a special tax to be levied upon real estate and slaves. But the provision made for the payment of the bonds was not taxation, but the application to the redemption of the bonds, of the stock itself, obtained by the subscription made by the City. It was contemplated by the legislature, that the stock would prove valuable, and be an adequate provision for the ultimate payment of the bonds. Indeed, it was anticipated that dividends on the stock would be paid before the maturity of the bonds, in which contingency the act provided, that whenever the dividends should equal the six per cent interest on the bonds, the tax for interest should then cease, and the excess of dividends over the amount required to pay the interest, should

be applied to purchase the bonds issued under the act. In accordance with the theory, that the shares of the capital stock, subscribed for, and the dividends thereon, would serve as an ample provision for the payment of the bonds, and that it was necessary to provide a tax for the interest only, on the bonds until such period as the dividends on the stock would commence, the legislative enactment, after providing for this limited tax for interest, was "that the City bonds issued to said railroad company, shall be received by it at its par value, and said company shall issue to the City of New Orleans therefor certificates of stock, for an amount equal to the amount of the bonds received and *the stock of the Company thus issued to the City, shall remain forever pledged for the redemption of said bonds*," provided that any holder of bonds should be allowed to convert his bonds into stock on surrender of the bonds.

See act of Legislature of Louisiana, No. 109, p. 72, sections 1 and 3.

The Acts required the subscriptions to be approved by the popular vote. In accordance with this requirement, the ordinances of the Common Council, providing for the subscriptions were submitted to the voters, approved by them, and the bonds were issued.

On April 1, 1870, the Legislature of Louisiana directed the Governor of the State to sell the stock of the city of New Orleans in the railroad company, acquired under the act of 1854 under which direction the stock, which was "to remain forever pledged for the redemption of the bonds," was sold.

See Act Legislature of Louisiana, No. 76, of 1870, session acts, p. 188.

The bonds were unpaid at maturity. The relator having acquired the bonds with the coupons attached, to the amount of fifty-nine thousand nine hundred and sixty dollars, sued thereon, recovered judgment in the United States Circuit Court for the Fifth Circuit and District of Louisiana, issued his execution, which was duly returned, "no property found."

See judgments, executions and return, Record, pp. 3 to 7.

On this return being made, the relator applied for a writ of mandamus, reciting the recovery of the judgments, the

issuing and return of the executions, "no property found," and the sale of the stock pledged for the redemption of the bonds. The relator prayed that the city be compelled by the mandamus to pay the amount of the judgment out of the proceeds of the sale of stock, or in default thereof, that the city be ordered to levy a sufficient tax to pay the judgments.

The answer of the city denies, that there is any law authorizing any tax to be levied for the principal of the bonds, avers that the only provision by taxation made by law was for the interest on the bonds; that such interest is provided to be paid out of the back taxes levied, which provision, is stated in the budget of the city for 1876; the answer further avers that the proceeds of sale of the stock were received by the authorities of the city in office in 1870, when the sale was made; that no portion of said proceeds was in the treasury of the city, having long since been used and expended, and no portion thereof ever came into the possession of the respondents, the present authorities of the city; that no mandamus can issue to compel payment of relator's demand out of proceeds not in existence; and the answer concludes by denying that there is any authority to issue the mandamus. To this answer there was a demurrer, which wasoverruled by the judgment of the Court. From that judgment refusing the mandamus the relator prosecutes this writ of error. The opinion of the lower Court is reported in 2d Woods, p. 230.

See Record, p. 1, ans. p. 2.

Judgment, Record, p. 10.

ARGUMENT.

The taxing power belongs not to the judiciary, but to the legislative department of the government. The writ of mandamus is only effective to compel the levy of a tax, to satisfy judgments on municipal bonds, when the proper department of the government, has directed said tax to be imposed. If the legislature has provided no tax for the payments of the bonds, on which the judgments in this case, have been recovered, to grant the mandamus would be an assumption of legislative power on the part of the judiciary. This Court defined the

scope of the judicial power in respect to the issuing of a writ of mandamus to compel the levy of a tax, in language that epitomizes all that need be said on this point. "The power we are asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty, State or national. In the case before us, the national sovereignty has nothing to do with it. The power must be derived from the legislature of the State." 19 Wall., p. 660. So in this case; if the power to direct the levy of the tax exist, it must be derived from the legislature of the State. If that power has conferred no tax to pay the bonds, on which the relator has obtained his judgments, the language of this Court, quoted in this connection, announces the decision in this case. The writ of mandamus is not competent to create a tax for the relator's benefit; the writ can only act upon and make effective the law, it finds upon the statute book. If no tax has been awarded by the legislative power for the relator's bonds, his application necessarily fails.

See Heine vs. Levee Commissioners, 19th Wall., p. 657.
Supervisors vs. United States, 18th Wall., p. 77.
Rees vs. City of Waterton, 19 Wall., p. 660.
Rigg vs. Johnson County, 6 Wall., p. 192.

The act under which the bonds issued, carefully witholds any tax for the principal of the bonds. It provides only for a tax to pay the interest on the bonds until the dividends amounted to six per cent. per annum, the amount of the annual interest stipulated to be paid on the bonds. The provision in the act in respect to the tax is as follows:

"3d. That a special tax on real estate and slaves shall be levied in January of each year, sufficient to pay the annual interest on said bonds, specifying the rates of said tax, which shall be collected at the same time and in the same manner as the Consolidated loan tax of said City; and all ordinances, resolutions or other acts passed by said Council after the first day of January in each year, except an ordinance to impose said Consolidated loan tax, and an ordinance to impose a tax for the payment of interest on bonds which may be hereafter issued for subscription to the New Orleans, Opelousas and Great Western

Railroad Company, shall be null and void, unless a resolution imposing a special tax for the payment of the interest on said bonds issued to the Railroad Company herein named, shall have been previously passed; provided that no levy of a tax for the payment of interest on said bonds shall be made after the payment of dividends of six per cent. per annum on the stock of said Company held by the City, as hereinafter provided, which dividends shall be applied by the City to the payment of the interest; and provided, further, that whenever the dividends on said Railroad stock of the City shall amount to more than six per cent. per annum, the excess after the payment of interest, shall be applied to the purchase of the City bonds issued under the provisions of this act; it being understood that when dividends for less than six per cent. per annum are received on the Railroad stock of the City, a tax for interest shall be levied for the difference only between the amount of said annual dividends and the amount of the annual interest."

Not only is there no provision for the tax here demanded, but there is an absolute prohibition of any such tax, arising by necessary implication. The provision for the payment of the principal of the bonds, was the stock itself, "to remain forever pledged for the redemption of the bonds." (Section 3, Acts 1854, p. 74.) The legislative theory was the stock would prove valuable, and a full equivalent for the bonds, hence, that there was no necessity for any tax for the principal. Indeed, it was contemplated that the dividends on the stock, anticipated to be paid before the maturity of the bonds, would produce an amount not only sufficient to pay the interest, but a fund to purchase the bonds themselves. Hence the direction in the act, that the excess of the dividends after payment of the interest should "be applied to the purchase of the City bonds issued under the provisions of the act." To grant the tax for the principal of the bonds demanded by the relator, would be to supplement the legislation with a tax it not only does not provide, but a tax which is also repugnant to the manifest intent of the legislation, and actually prohibited by evident implication. Is it to be maintained, that the judicial power to grant the mandamus, not only is competent to create a tax which the

legislative department has not provided, but that the writ is to subvert the legislative will to the contrary, clearly manifested?

The reasons for the exercise of the taxing power, address themselves exclusively to the legislative department. The judicial power is not to be invoked when the legislative provision for the public obligations, proves illusory and insufficient. The real difficulty in the way of the relator is, that the pledge set apart by the Act of 1854, for the redemption of his bonds, has been diverted by those in authority, and he is left without satisfaction of his debt. But it is manifest the courts cannot correct that grievance by furnishing him another provision for payment, in the form of a tax, which the legislature has not seen fit to give him. The judicial power is not competent, to supplement the supposed deficiencies in legislation. It can only adjudicate issues of rights based upon that legislation. And unless this court can remodel and extend the scope of the special tax authorized by the Act of 1854, it is too clear that the relator can obtain no relief, unless the tax he demands is to find support in some point other than the Act of 1854, under which the bonds in judgment were issued.

The exclusion of the relator from any tax for the principal of his bonds, is made, if possible more clear by reference to the general provisions of law applicable to the City of New Orleans, restricting its power to contract debts. In the Act of 1853 it was provided, that the police juries of the several parishes and the constituted authorities of incorporated towns and cities. shall not have power to contract any debt or pecuniary liability, without fully providing in the ordinance creating the debt the means of paying the principal and interest of the debt so contracted.

See acts of 1853, p. 234, reproduced in section 2448, of the Revised Statutes of Louisiana.

This provision in substance had previously, in 1852, been incorporated in the charter of the City of New Orleans. See Acts of 1852, p. 54, section 37. The Constitution of the State of 1852 imposed the same restriction upon the legislature in the following words:

Article III. "Whenever the general assembly shall contract a debt exceeding in amount the sum of one hundred thousand dollars, unless in case of war to repel invasion or suppress insurrection, it shall in the law creating the debt, provide adequate ways and means for the payment of the current interest, and of the principal when the same shall become due; and the said law shall be irreparable until principal and interest be fully paid, or unless the repealing law contain some adequate provision for the payment of the principal and interest of the debt."

This rule of legislation in force when the Act of 1854 was passed, authorizing the issue by the City of these railroad bonds was, that in the law or ordinance creating any debt, the "ways and means" for the payment both of principal and interest of the debt should be provided. When the act of 1854 was enacted provision was accordingly made for the payment of the interest on the bonds, by means of the special tax on real estate and slaves. The same provisions for the interest was also made by the ordinance of the Common Council, framed in pursuance of the legislative act, and printed at p. 14 of the appendix to the relator's brief. But other and different provision was made for the payment of the principal of the bonds, *i. e.*, the pledge of the stock for which the city subscribed. The legislature made a marked distinction between the provision for the payment of the interest and the provision for the payment of the bonds. For the interest a special tax was to be levied; but for the principal of the bonds, the stock was to remain forever pledged. The absence of any right in the relator to demand a tax for his bonds is much more conspicuous when it is considered that the provision for the redemption of the bonds contained in the Act, was made in accordance with the requirement, that the "ways and means" for the extinguishment of the corporate debts should be specified in the act or ordinance creating the debt. Can it be maintained that when provisions for the public creditors is required to be made, and that provision of a specific nature is made, that the creditor can invoke at the hands of the court, a totally different provision. If the legislative expression is to be the test for the interposition of the judicial power, in

issuing the writ of mandamus to compel the levy of a tax, the demand in this case, finds a plain answer. The portion of the opinion of the court in the significance to be attached to the means of payment specified in the Act, is reproduced here.

"Now it is urged by the counsel for the city, that the statute by which these bonds were authorized shows that the legislature intended that the principal should be paid by means other than taxation. An examination of this statute has convinced me that the belief of the legislature was that the principal sum could, and its intent was that the principal sum should be paid out of the stock and its revenues. The act pledges in perpetuity the stock for that purpose; it gives the right to the bondholder to convert his bond into stock; it provides that all dividends derived from the stock above six per cent. should be devoted to extinguish the principal; and while providing with extreme rigor for the payment of the interest, in case dividends from the stock should not be altogether sufficient, and, while providing that until the ordinance levying this yearly tax to pay the interest had been passed by the Common Council, no valid resolution could be adopted, it is profoundly silent as to any tax to pay the principal. The implication is that the legislature intended the bondholder should, for the collection of the principal sum, look to the stock, at least to the exclusion of taxation.

"But, among the statutes of the State, with reference to the city of New Orleans, and among the general statutes of the State, are found acts that give the absence of any particular means of payment in a city ordinance creating a debt a special significance. The act of 1852, No. 51, entitled 'an act to consolidate the city of New Orleans and provide for the government,' etc.; section 27, page 54, contains the following provision: "And no ordinance (of the city of New Orleans) creating a debt or loan, shall be valid, unless for some single object, or work distinctly specified therein, and unless such ordinance shall provide ways and means for the punctual payment of running interest during the whole time for which said debt or loan shall be contracted, and for the full and punctual discharge at maturity of the capital borrowed or the debt incurred.

"The act of 1853, No. 258, p. 234, provides "that the police juries of the several parishes of this State, and the constituted authorities of incorporated towns and cities in this State, shall not hereafter have power to contract any debt or pecuniary liability without fully providing, in the ordinance creating the debt, the means of paying the principal and interest of the debt so contracted."

"A subsequent section provides that 'whenever police juries or authorities of incorporated towns or cities shall have provided for the payment of a debt by levying a tax, and shall fail or refuse to cause said tax to be collected, the court rendering judgment may issue its mandate,' etc.

"Now, since the general statute, and the statute with reference to the city of New Orleans, struck, with nullity, all obligations of cities, unless the ordinance creating the same, fully provided for the payment; and since one of the same statutes makes special enactments with reference to cases where 'the provision for payment shall be by levying a tax,' thereby showing that taxation was included in the term 'means,' it seems to me, that, when a contemporaneous legislature authorized a city to issue bonds and prescribed the form of the ordinance which the city Common Council should adopt, creating the obligation, the failure of such ordinance, to prescribe any provision for taxation, and the insertion in such ordinance of other means of payment which appear to have been deemed abundantly adequate, of itself, repels the inference that taxation was intended.

The legislature knew that the ordinance was void unless it contained full provision for payment. It meant, therefore, to set forth all the 'means' which were to be considered as provided, and any addition of means by way of inference is excluded."

If therefore the Act of 1854, is the test by which his right to the tax is to be determined, his pretensions admit of no countenance. The writ if issued, would not only create a tax, but would subvert the legislative will so plainly manifested, that no tax should be imposed, for the bonds on which the judgment had been obtained.

The relator urges that the power to tax is implied, from the power to contract. If this were so, then whenever a judgment against a corporation was unsatisfied, the taxing power could be exerted by the courts. It is difficult to reconcile the proposition contended for by relators, with the common understanding of the judicial functions. The objects of taxation, the mode in which the taxes are to be raised, and the purposes to which they are to be applied, are subjects committed in every constitutional government, to the legislative department. It is generally understood that it is for the legislature to determine how the public debts are to be provided for, and while taxation on property is the ordinary source of public revenues, there are other resources from which the provision is often drawn. But this theory of the legislative power completely disappears, if it be true, that the mere power to contract a debt, conferred on a municipal corporation, carries with it the right in courts of justice to compel the levy of a tax, when the debt exists in the form of an unsatisfied judgment. For if without any law upon the statute books, expressly authorizing the levy of any tax to pay the judgment, the power to tax is to be implied from the power to contract, and to be enforced by the courts, it is manifest that the function of taxation, involving all the delicate questions of its adjustment, would to a great extent, be imposed in the courts of the country. The only limitation on this exercise of taxation, through the machinery of writs of mandamus, would be the amount of unsatisfied judgments existing in the Federal courts against municipal corporations. It was not considered to be the law in 19 Wallace, p. 651, that the holder of a corporation bond, representing a debt contracted by the parishes of Madison and Carroll, in pursuance of authority of law, could call upon the courts to direct the levy of the tax, although the power to make the levy had been conferred upon officers, who had resigned or pretended to resign. It is true that the case of Heine, 19 Wall., p. 655, was an equity proceeding, in which no mandamus could be awarded, but the spirit of the decision is, that if the bill could be treated as an application for a mandamus, the courts would have to follow the law as they found it, and were not at liberty

to deduce the power to direct the levy of a tax from implication, arising from an unsatisfied corporate debt. The Court observed:

"It is, however, the experience of every day and of all men, that debts are created which are never paid, though the creditor has exhausted all the resources of the law. It is a misfortune which in the imperfection of human nature, often admits of no redress. The holder of a corporation bond must in common with other men submit to this calamity, when the law affords no relief.

"The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty, State or National. In the case before us the National sovereignty has nothing to do with it. The power must be derived from the legislature of the State."

In the cases of mandamus that have come under consideration in this Court, the laws of the State have directed the taxes to be levied. The writs of mandamus have issued in such cases to compel the execution of the law—directing and providing for the levy of the tax. But in no case in this Court, it is believed has a writ of mandamus issued, in the absence of express legislation authorizing the imposition of the taxes. In the leading case of Van Hoffman vs. the City of Quincy, 4th Wallace, p. 535, the sylabus is when a *statute* has authorized a municipal corporation to issue bonds, and to exercise the power of local taxation in order to pay them, the power of taxation thus given is a contract, and in such case the statute providing for the tax, the mandamus issued.

See also Supervisors vs. United States, 4th Wall., p. 435.

Riggs vs. Johnson County, 6th Wall., p. 166.

City of Galena vs. Amy, 5th Wallace, p. 705.

The relator cites the decision of his Honor the Chief Justice, in the case of Parsons vs. The City of Charleston, U. S. District Court, South Carolina. The defence was as is gathered from the opinion, that no special provisions for the tax entered into the contract, and there was no power in the city to make the levy. But the court was of opinion, that the charter of the City of Charleston and the Constitution of South Caro-

lina, gave ample power to levy and collect all that may be necessary to discharge the corporate obligations. But the power to tax was not necessary to be implied from the power of the City to contract debts. The court reviewed the provisions in the charter which gave the City "full power and authority to make such assessments on the inhabitants of the City, or those who hold taxable property within the same, for the safety, convenience and benefit of the City, as shall appear to them prudent." And then the court quoted, the Constitution of the State which gave to corporate authorities of cities, power to assess and collect taxes without limit. The court observed that under these provisions, there was no legislative limit to the amount of money, that may be raised by taxation. Ample power, said the court, was given to levy and collect all that was necessary to discharge the corporate obligations. Whatever the court may have said in that case, it is apparent, that there was no necessity to deduce the power to levy the tax, from the corporate power to contract debts. The power of taxation was expressly given both by the constitution and the city charter, although not, it would appear from the opinion, in the act under which the bonds issued. But the Court was not required to create a tax, in that case by implication. It found the tax provided, by the legislative power, and the mandamus issued to enforce the collection of that tax.

The Court in the case of Parsons, referred to the cases adjudicated here. It vindicated the right of the relator, to the mandamus to compel the levy of the tax. It asserted the right could be derived from the power to tax, though not conferred in the act authorizing the bonds; if it was in fact conferred by independent or even subsequent legislation, and in this connection the Court cited the case of Supervisors vs. United States, 4th Wall., 435. But what is material to this case and to the defence here, is, that in that case the legislative department authorized the city to levy taxes by express enactments, conferring a power which the court said was without limit. What is important and controlling here, is, that not only, is no tax provided by the legislature, but taxation is in fact prohibited by evident implication. The decision in the case, of

Parsons is then no warrant for the proposition that a Federal Court can deduce the power to issue a mandamus to compel the levy of a tax, merely from the power conferred by the legislature on the corporation to contract debts.

So of the case in 57 Missouri, p. 129, the legislative authority to raise taxes was expressly given. The Court held that the relator was not excluded from sharing in the general taxes, but the power to levy the tax was unquestioned. It was a question of the application of taxes.

But if the power to levy taxes could be deduced from the power to contract debts, at least, it must be a reasonable implication, arising from a fair consideration of the legislation authorizing the debt.

The Court said in the case of the Loan Association vs. Topeka, 20 Wallace, p. 660, (a case not involving the right to the writ of mandamus, the question here): "It is to be inferred that when the legislature authorizes a city or county to contract debts, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation on the power of taxation which repels such inference. So in Armstrong vs. Alleghany County, 37 Penn. State, 290, the Court observed that "the authority to create a debt implies an obligation to pay it, and when no special mode of doing so is provided, it is also implied that it is to be done in the ordinary way, by levy and collection of taxes."

But in the case here, a special mode of paying the principal of the bond is provided by the statute, that is the stock to "remain forever pledged for the redemption of the bonds." With this special provision, how can it be implied that the legislature intended another provision? If it is to be implied, that taxation is to be the mode "when no special mode is provided for;" how is this Court to deduce such implication when a special mode other than taxation *is* provided. Again the tax in this Act of 1854 is to be for interest, and interest only for a certain period. Is not that provision of a tax for interest only, and a tax to be levied for a limited period, "a limitation on the power of taxation, which utterly repels and forbids the

inference, that the legislature intended a resort to taxation for the principal of the bonds. The decisions which affirm the power of taxation, as a necessary inference from the power to contract debts, conferred on a corporation, recognize that the legislative will in respect to taxation, must be the test whenever the right of taxation becomes the issue before the courts. And this class of decisions require, that when the power is implied, that the implication shall be rational and consistent with the legislation, from which it is deduced. But the case here, is one in which the implication cannot be indulged without palpable violence to the plain words and meaning of the legislative act. This class of cases, favoring the implication in favor of the right to the tax, recognize the test, fatal to that implication, which are found in this Act of 1854. No tax can be accorded to the relator here, unless the judicial power can override the legislative will, whether that will is to be sought in express terms or implication, for the act of 1854 in terms, spirit and manifest intentment, is utterly opposed to the relator's pretensions.

Nor does the relator derive any support, from the conversion of the pledge of the stock, by his debtor. Whether the Legislature of 1870, could give any authority to sell the stock pledged for the redemption of the bonds, is not the issue. The propriety of that transaction, is not involved here. The stock was sold, and the proceeds appropriated. No part of these proceeds were in the possession of defendant, to respond to the relator's demand. No part of those proceeds ever came to the hands of the present authorities of the city, the defendants here. (See return to writ, Record p. 8.) What possible application can the writ of mandamus have, to reach funds long since consumed, by the past administration of the City of New Orleans. What duty to be enforced by mandamus, rests on the defendants here, the present representatives of the City. They can only answer the funds are gone, and from no act or agency on their part. Mandamus issues to compel the performance of ministerial duties. It does not issue to compel impossibilities, as the court below observed: "If there are no funds arising from the sale in the treasury of the city,

now under control of respondents and they were spent years since by respondent's predecessors, it would be idle to issue a mandate to the respondents to pay relator out of them." Whatever may be the remedy of the relator by reason of the special facts of their transaction, it is clear he is entitled to no mandamus." The law gave him the pledge of the stock. It did not contemplate the sale of that pledge. It gave no tax dependent on a contingency, not even contemplated.

But the relator supposes that his right to the tax is to be derived from other acts of the legislature of Louisiana. The Act of 1856, session acts, p. 148, section 42, which is in the following words:

"SECTION 42. *Be it further enacted, etc.*, That the Common Council of the city of New Orleans shall, for the purposes of this act, once, and not oftener, in each and every year, lay an equal and uniform tax upon all property, real and personal, in said city; but said tax, added to the Consolidated Loan tax, and to the Special tax for payment of the annual interest on the bonds issued by the city for subscriptions to the stocks of the New Orleans, Opelousas and Great Western Railroad Company, the New Orleans, Jackson and Great Western Railroad Company, and the Pontchartrain Railroad Company, shall not in the aggregate be more than one dollar and fifty cents on one hundred dollars of valuation, except in case of invasion or insurrection: Provided it be sufficient to pay the interest on the consolidated debts and railroad bonds issued by the city of New Orleans."

But that merely provided a tax for the interest in the bonds. It made no allusion whatever to the principal of the bonds, then but recently issued. And the power of taxation by that act was limited to "the purposes of that act," which embraced taxation for interest only on the bonds, as was intended by the act of 1854. This act of 1856, which was the city charter, superseded all previous powers of taxation, and substituted the tax created by the 42d section. Neither the act of 1805, or of 1836, referred to in the opinion of the lower Court, certainly authorizes no tax for the principal of the bonds. See opinions in 2d Wood.

The Act of 1856, in its 42d Section, substituted in lieu of all other taxes the one uniform rate not to exceed one and a half per cent, to be imposed for the purposes of that act. The purposes of the act embraced the tax for the interest on the bonds as was required by the act of 1854, but the tax provision went no further. The Act of 1872, to which allusion has been made in the relator's brief, refers to bonds for which no retiring provision is made by law. But for the bonds here provision was made by the act of 1854, as has been seen. The Act of March 6, No. 31, of 1876, prohibited the City of New Orleans from levying any tax for bonds, or interest on bonds, except the tax authorized by that act, which excludes the relator's bonds. This act is printed in the appendix. None of this legislation, gave to the relator the tax he asks. The principal of his bonds had been provided for in the Act of 1854. The provision remained untouched and unchanged by the legislation of the State, and indeed, the power of the legislature to modify, change and repeal taxation, is unrestricted, provided the taxes in existence when the debt is created are preserved to the creditor. See Van Hoffman vs. The City of Quincy, 4th Wallace, p. 535. The provision made by the principal of the bond by the Act of 1854, has not been repealed by legislation. The real complaint of relator is that the pledge has been disposed of by the former administrator, of the city. But his reference to other legislation cannot serve any purpose.

As to the interest on the bonds, the return shows that taxes have already been levied. The return is that provision for the interest, has been made out of the back taxes. When a tax has been levied, its non collection does not furnish any reason for directing the levy of another. No issue was made on the return. It was demurred to. The provision was made on the budget of the city made up in accordance with law.

Acts 1872, section 14, p. 127.

The relator alludes to an expression of his Honor, Judge Woods, in 2d Woods, p. 134, which relator conceives strengthens his demand for the tax. But the tax was not demanded or at issue in this case. The plaintiff there was seeking other

elief, and failed. The expression was obiter. Nor did his Honor, Judge Billings, in the same court, hold that the bonds were stricken with nullity, as contrary to the 37th section of the Act of 1852. He affirmed that the bonds were issued in conformity with that section, which required provision to be made. Part of Judge Billings language, was that the legislature intended the bondholder should, for the collection of his principal, look to the stock at least to the exclusion of taxation. We refer to the whole opinion.

The relator insists that the validity of his bonds has been vindicated. There is no question here, as to their validity. But the issue is, has the relator a right to the tax. No argument to sustain the validity of the bonds can demonstrate the relator's right to the tax, from which he is precluded by the positive legislation on which his asserted right depends, and by which test it fails.

The affirmance of the judgment is asked for.

Respectfully submitted,

B. F. JONAS,

HENRY C. MILLER,

Of Counsel for Defendants.

APPENDIX.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened*, That the mayor and administrators of the City of New Orleans, or such other officers, aldermen or administrators as may hereafter be ordained and established, be and they are hereby authorized and directed to exchange all recognized and valid bonds of the city of New Orleans and the late cities of Jefferson and Carrollton for bonds known as the premium bonds of the city of New Orleans, in accordance with the plan adopted by the City Council, and approved by the Mayor on the twenty-fifth May and thirty-first August, 1875. The said premium bonds shall be dated the first of September, 1875, and bear interest at the rate of five per cent. per annum, from the fifteenth of July, 1875; they shall be signed by the Mayor, the Administrator of Finance, and the Administrator of Public Accounts, as commissioners of the consolidated debt, and countersigned, when issued, by such parties as the Council have designated heretofore, or may hereafter designate, with the authorization of the supervising committee hereafter named.

SEC. 2. *Be it further enacted, etc.*, That all outstanding bonds bearing interest shall have the interest computed up to the first day of July, 1875, and thereafter the said bonds, when exchanged, shall bear interest as provided in the ordinance above ratified, which provides for the premium bonds.

SEC. 3. *Be it further enacted, etc.*, That the allotment of series and premiums which have been made by virtue of ordinance No. 3233, Administration series, adopted August 31, 1875, by the City Council, are hereby ratified and approved; and that further allotments shall take place on the fifteenth day of April and the fifteenth day of October of each year, and of premiums on the fifteenth day of January and the fifteenth day of July of each year, or on such other date as the Council

may prescribe; provided that payments be not made later than the fifteenth day of March and the fifteenth day of September of each year.

SEC. 4. Unimportant.

SEC. 5. Unimportant.

SEC. 6. *Be it further enacted, etc.*, That it shall be the duty of the City Council, in the month of December of each year, or in the annual budget annually adopted for the ensuing year, to include an amount sufficient to meet and pay the principal and interest of the premium bonds, together with premium included, in the several allotments of series and premiums fixed for such year by the aforesaid ordinances and this act. It shall be the duty of the Council annually to levy an equal and uniform tax on all the assessed property within the corporate limits of the city, at a rate sufficient to provide the amount included in the budget as aforesaid, and said tax so levied shall constitute a special fund to be used for no other purpose than the payment of said bonds and interest on the said premiums comprised in said allotments, and the funds so raised shall be placed to the credit of an account to be called the premium bond account, and no money from said fund shall be paid out except on the joint authority of the commissioners of the consolidated debt. The said tax so to be raised shall be denominated the premium bond tax, and shall be separately mentioned in the tax rolls and receipts: *provided*, that the taxable power of the corporation of the City of New Orleans for all purposes, including general administration, school, police, lighting, salary of officers, court expenses, and every other purpose of government, including the sum to be raised to pay the premium bonds, as above stated, shall never, until the full, complete and final payment of the said premium bonds, exceed the rate of one and one-half per centum on the dollar of all the assessed value of property subject to taxation within the limits of the said City of New Orleans. The above limitation of the taxable power of the corporation is hereby declared to be a contract, not only with the holder of the said premium bonds, but also with all residents and taxpayers of the said city, so as to authorize any holder of said

premium bonds, resident or taxpayer, to legally object to any rate of taxation in excess of the rate herein limited. It being also a part of the consideration of this contract that the City of New Orleans shall be incompetent to incur any debt or obligation, as now provided by the constitution of this State, until the final payment and extinction of the premium bonds aforesaid.

SEC. 7. *Be it further enacted, etc.*, That no tax for the payment of bonds or interest on bonds other than that authorized by the preceding sections, shall be levied either for the year 1876, or any year or years thereafter by the City of New Orleans, and that all existing laws requiring or authorizing the City Council to levy any tax whatsoever for bonds or interest on bonds, other than said premium bonds, be and the same are hereby repealed; and it shall be hereafter incompetent for any court to mandamus the officers of said city to levy and collect any interest tax other than that provided in this act, or in case of such mandamus, by a receiver or otherwise, to direct the levy and collection on any such tax.

SEC. 8. Unimportant.

SEC. 9. Unimportant.

SEC. 10. Unimportant.

SEC. 11. *Be it further enacted, etc.*, That in addition to the obligation of the said city to provide annually the sum required for the execution of the premium bond plan, at least a tax of one-half of one per cent. annually, to be used in the execution of the provisions of this act; and if the product of said half of one per cent. be more than adequate for the payment of the drawn premium bonds, and the premiums as above provided, then the surplus to be used in retiring the outstanding bonds; *provided*, said half of one per cent. taxation be considered as part of the one and a half per cent. taxation to which the taxing power of the city is limited in this act; the intention of this section being to limit the city taxation to one and one-half per cent. annually until the entire extinction of the bonded debt; to authorize the Council to levy annually out of the one and one-half per cent. taxation a sum adequate to the annual execution of said premium bond plan, and after the

year 1881 to levy at least one-half of one per cent. for the carrying out of said plan, and to distribute the surplus realized therefrom, if any, in retiring the outstanding bonded debt.

SEC. 12. Unimportant.

SEC. 13. Unimportant.

SEC. 14. Unimportant.

SEC. 15. *Be it further enacted, etc.*, That this act in all its provisions and limitations be held a contract between the City of New Orleans, the holders of said premium bonds and the taxpayers or residents of said city, so as to authorize any of the contracting parties to resist any and all contracting of debt by the said city, or increase of taxation above the rate limited in the previous provisions of this act.

SEC. 16. *Be it further enacted, etc.*, That this act take effect from and after its passage; that all laws or parts of laws inconsistent herewith be and the same are hereby repealed, and that all ordinances of the City of New Orleans conflicting with this act be and are hereby repealed.

(Signed) E. D. ESTILETTE,
Speaker of the House of Representatives.

(Signed) C. C. ANTOINE,
Lieutenant Governor and President of the Senate.

Approved March 6, 1876.

(Signed) WILLIAM P. KELLOGG,
Governor of the State of Louisiana.

A true copy:

P. G. DESLONDE,
Secretary of State.

Oct. 7. 1878

United States Supreme Court.

No. 150.

THE UNITED STATES ON THE RELATION OF
MORRIS RANGER
vs.
THE CITY OF NEW ORLEANS.

Application for Re-hearing

B. F. JONAS,
BENRY C. MILLER,
Of Counsel for the City.

L. Graham Brief Printer, 127 Gravier St.

United States Supreme Court.

No. 150.

THE UNITED STATES ON THE RELATION OF
MORRIS RANGER
vs.
THE CITY OF NEW ORLEANS.

Application for Re-hearing

In all judicial controversies respecting taxation, undoubtedly the legislative will must be strictly observed; as stated in the opinion, "that the power of taxation belongs exclusively to the legislative will, no one will controvert." When it is considered, that in no case hitherto decided by this Court has the power of taxation been sought or found, except in the express direction of the legislative power, it will not it is hoped, be deemed out of place to ask at the hands of this Court, a re-examination of the grounds upon which in this case, the tax claimed has been deduced by implication, resting in part, it is believed, on a misapprehension of the legislation of Louisiana, and to some extent on grounds which the Court is respectfully asked to re-examine.

If the implication in favor of the tax here claimed is clear, it is not denied, that the tax would rest on a foundation as solid, as any supplied by express enactment. But it is confidently believed that on a re-examination of the case, and especially of the legislation of Louisiana involved in the discussion, the supposed implication in favor of the tax will not be deemed to admit of the requisite support.

The City Charter of 1805, is meagre in its grant of the power of taxation. Its provisions touching the subject are: The inhabitants of the City of New Orleans shall be a body corporate, by the name of the mayor, aldermen, and inhabitants of

the City of New Orleans; and by that name, they and their successors, shall be known in law, and be capable of suing and of being sued, and of defending in all courts and in all actions and matters whatsoever; and may have a common seal, and may alter and change the same at their pleasure.

The 6th section of the Act provides:—"The said Mayor and City Council (Aldermen) shall have power to raise by tax, in such a manner as to them may seem proper, upon the real and personal estate within said city, such sum or sums of money as may be necessary to supply any deficiency for the lighting, cleansing, paving and watering the streets of said city; for supporting the city watch, the levee of the river; the prisons, work-houses and other public buildings, and for such other purposes as the police and good goverment of the said city may require."

Nor is the legislative grant of the taxing power, enlarged by the Act of 1836, which divided the corportion into municipalities. In that act the provision was:

"SEC. 4th. *Be it further enacted, &c.*, That each of said municipalities of the city shall possess separate corporate rights, and are hereby declared to be distinct corporations, and shall possess generally all such rights, powers and capacities, as are usually incident to municipal corporations; shall have a seal, and the same may alter and renew at pleasure; shall be capable of suing and being sued; of acquiring by onerous or gratuitous title all kinds of property, real, personal, or mixed; of enjoying, alienating, mortgaging, and otherwise disposing of the same, and in general, shall possess and exercise within their respective limits, all such powers, rights and privileges, as are now possessed and exercised by the corporatihn of New Orleans."

See Acts 1836. p. 31, sec. 4.

Next in order of time, is the Act of 1852, which without addition or enlargement carried the same powers to the new corporation, made by consolidating the three municipalities into which the city had hitherto been divided, with the addition of the adjoining city of Lafayette. The Act of 1852 directed a specific tax, called the "Consolidated Loan Tax," to be levied ior the debts of the old city and of the three municipalities. But

sought to created[3]

gave this tax for the specific debts mentioned, the act gave no other power of taxation, than such as is to be deemed comprehended in the language vesting the city with all the powers, rights, privileges and immunities incident to a municipal corporation and necessary for the proper government of the same, and declaring that upon the reorganization of the Council of the city under the act, all previous rights, privileges and immunities enjoyed by the old city and the municipalities were to vest in the city created by the Act of 1852.

See Acts of 1852, pp. 42, 48, 53, 55.

The act of 1805, of 1836 of 1852, thus brought to the attention of the Court, exhibits all the legislation down to 1852, bearing on the power of taxation conferred by the Legisiature, on the corporation, leaving out of view the special enactments relating to taxation for Railroad Bonds to be examined further along in this argument. If the right to the tax for these Railroad Bonds, find no support in the legislation down to the City Charter of 1852, it will be easier to deal with the question of that tax, as dependent in the special legislation on this subject.

The legislation relating to the city of New Orleans embodied in the Act of 1805, 1836 and 1852 to which attention has been called, if it does not prohibit taxation for railroads in express terms, certainly enumerates the purposes for which taxes may be levied, in terms that have hitherto been universally accepted, as excluding taxes for aid railroads. Surely, in the light of authorities hitherto accepted, no power to tax for railroads would be sought for or attempted to be maintained under the restricted grant contained in the Act of 1805, continued in force in the charters of the municipalities in 1836, and again continued in the charter of 1852. What was that grant of power? It was "to raise by tax, in such manner as to them may seem proper, upon the real and personal estate, such sums of money as may be necessary to supply any deficiency for the lighting, cleansing, paving and watering the streets, for supporting the city watch, the levee, prisons, workhouses and other public buildings, and for such other purposes as the police and good government of this city may require." Act 1805 cited, and such power as passed by clothing the city with all the

powers, rights, privileges and immunities incident to a municipal corporation and necessary for the proper government of the same. Nor can the force of this grant, and these rights, privileges and immunities necessary for the proper government of the corporation be construed to carry the power to tax for railroads. The taxation for railroads is exceptional and extraordinary, manifestly beyond the scope of ordinary police purposes and of "good government," and this is the common understanding, the legislative interpretation and judicial construction. Upon such legislation it will not be contended, that the legislature intended special taxation for railroads.

That no taxation to aid railroads was permitted without express authority from the legislature, and that no warrant for such taxation could be found in the ordinary powers granted to the corporation, is evident from the fact that the legislature of Louisiana in 1852, by express legislation conferred that power on municipal corporations, to subscribe for the stock of corporations undertaking works of internal improvements and to levy tax for such on certain conditions.

See Acts of 1852, p. 128.

The legislation was assailed but the Supreme Court of the State maintained its validity.

See Police Jury in Succession of McDonough, 8th Louisiana Annual Rep. p. 341.

Judge Dillon in his work on Municipal Corporation treats aid to railway companies among the special powers, 1st Dillon, p. 188, § 66. The author says the most noted of extraordinary powers conferred on municipal corporations is the authority to aid in the construction of railways by subscription to their stock and taxing the property within their limits to pay the indebtedness thereby incurred. Ibid., p. 218, § 104. Again, Courts concur with great unanimity in holding there is no implied authority in municipal corporations to incur debts or borrow money in order to become subscribers to the stock of railway companies, the power must be conferred by express grant. * * * The power cannot be deduced from ordinary municipal grants. Ibid., p. 226. 2d Dillon, p. 708, § 607.

It is quite apparent, from this survey of the legislation of Louisiana down to the charter of 1852, that the corporation did not possess the power of taxation to aid railroads. Not only was such power not possessed, but the specific enumeration of the purposes of ordinary police for which taxation could be imposed, amounted to a positive prohibition of taxation universally conceded as extraordinary in its character, requiring an express grant and not covered by the usual powers, conferred by the Legislature on municipal corporations.

The special legislation, in force when the bonds issued involved here, relative to taxation for works of internal improvement, to which allusion has been made was embodied first in the Act of 1852, which made it lawful for Municipal Corporation to subscribe for stock in corporations proposing works of internal improvement, and on certain conditions to levy taxes on landed estate to pay for the subscription. Under this general law the city of New Orleans by the Council in 1852 passed an ordinance to subscribe to the stock of the rail roads, and authorized a tax to pay the subscriptions. See ordinances in appendix of relators brief.

The tax authorized by the ordinance proved ineffective, and in 1854, the legislature repealed the tax ordinance (Acts 1854, p. 70, § 5; p. 73, § 5), and authorized the city to issue the bonds involved in this discusion, providing a tax for the interest of the bonds, but none for the principal. The law made other provision for the payment of the principal of the bonds, *i. e.*, the stock of the railroad subscribed for by the city, which in the legislative theory at the time was deemed to be adequate provision for the principal of the debt. It was thought that the stock would prove valuable, and a full equivalent for the bonds, hence, that there was no necessity for any tax for the principal. Indeed, it was contemplated that the dividends on the stock, anticipated to be paid before the maturity of the bonds, would produce an amount not only sufficient to pay the interest, but a fund to purchase the bonds themselves. Hence the direction in the Act, that the excess of the dividends after payment of the interest should "be applied to the purchase of the city bonds issued under the provisions of the Act,"

Thus then the law stood when these bonds issued. The city charter permitted no tazation to aid railroads; the power conferred related only to ordinary purposes of police administration. The special legislation of 1852 authorizing special taxation for works of internal improvement, conferred no such tax for the principal of the bonds for none was created under that legislation. None was ever attempted to be given under that legislation, except the tax devised to pay the railroad subscriptions, which proving ineffective, after two years experience was abandoned and expressly repealed in the very Act, under which the bonds issued. That Act gave the tax for interest only, withheld all taxation for the principal, making other provision in lieu of and to the exclusion of taxation Thus the complete absence of any law, whatever, to authorize or permit taxation for the principal of these bonds, marked by the other circumstances of this case virtually amounted to a prohibition of that tax. This was the plight the bonds stood, when issued. The laws in force at *that* time is the measure of the right to the tax, 4th Wallace, 554. This was the conclusion of the Circuit Court. See 2d Wood's Rep. p. 28.

The ground on which this Court sustains the right to the tax, is, that the legislative authority, conferred on the corporation, to create the debt, carries by implication the right to the tax.

The case of the Loan Association vs. Topeka, 20 Wall. p. 655, cited in the opinion in this connection, involved the validity of certain municipal bonds issued as it was alleged, not for public purposes. The decision of this Court, was against the validity of the bonds. In illustrating the objection to the bonds, the Court referred to the exercise of the taxing power to provide for the payment of all lawful bonds. issued by the corporation, and the Court observed that if these bonds there in question, issued in aid of a private enterprise were maintained that in effect the people would be taxed to pay them. The Court substantially held that the taxing power could not be thus appled. To fortify the argument the Court observed that when cities were authorized to contract a debts, the tax to pay them was implied, unless

the implication was repelled by a limitation or restriction in the statute. That case did not present the issue here. It is believed that in no case hitherto decided by this Court, in which a mandamus has been claimed to compel the levy of a tax by a municipal corporation—and such cases have been frequent—has the source of the right been sought, except in the express legislative authority of the statute directing the levy of the tax. If the right to the tax is now to be adjudged upon implication alone, deemed to arise from the legislative authority to issue the bonds, it is an advance on previous decsions in this class of cases "always involving judicial duties of great delicacy." 4th Wallace, p. 549.

It is respectfully submitted that a law which merely authorizes the creation of a debt by a municipality, but is wholly silent in regard to taxation, is not capable of execution in itself, as a law to authorize and regulate taxation.

Whenever the taxing power is exercised by the proper department of the government, a variety of considerations of great difficulty, address themselves to legislative attention. The capacity of the taxable property to bear the proposed imposition, the designation of the objects of taxation, the rate to be imposed, the requisite machinery to be employed to procure the taxes when levied, are all questions incident to the exercise of the taxing power, and are purely legislative. It is not readily to be presumed, that the legislative department intended to surrender its functions in adjusting taxation, and determining its mode and incidents. Nor can such functions be transferred by that department, to which under the constitution they belong. But if the legislative authority to issue bonds, no tax being provided in terms, is to be deemed to imply an authority to tax, which the Court on that mere implication will enforce, is it not evident that on this theory carried into effect by the mandate of the Court, the legislative control over taxation is sensibly diminished, if not superseded.

In this case, the legislature of Louisiana, has performed no part whatever, in respect to the tax claimed, except to authorize the creation of the debt, by the corporation. If the authority to contract the debt, is in itself, the exercise of the taxing

power, which this Court substantially affirms, at least it is only a partial exercise of the power. The legislature has left untouched. all other incidents, belonging to the subject. It has not determined what property is to be taxed, for these railroad bonds, nor the rate of taxation to be imposed, nor any other question or incident concerned in the levy and collection of taxes, all of vital importance to the citizen.

Can it be maintained that the judiciary is competent to supply, by its mandate, all that is required to put in operation the taxing power, after the legislature has authorized the debt? That, it is submitted, is the practical result, if the judiciary is authorized to imply and enforce a tax, because the legislature has authorized a debt to be incurred. On this view, which department is most effective in exercising the taxing power, the legislative department or the judiciary?

On the theory under consideration, the legislative action ceases with conferring the authority to create the debt: the judiciary then interposes and by its mandate makes effective the taxing machinery: the species of property on which the burden is to fall: the rate of tax to be imposed is fixed and all the incidents of taxation will in effect be settled under the judicial direction, carried out by the city authorities, to whom the mandate issues.

The argument against the judicial implication of the right to the tax, that in effect it strips the legislative department of its exclusive control of taxation, is met by the suggestion that it is not the mandate of this Court, that adjusts taxation and puts the tax machinery in motion, but that the mandate acts only on the laws as they exist on the statute-book, and on the officers who should execute the laws. But this answer assumes that the authorities of the city of New Orleans on whom the mandate is to operate, have their duties defined in the premises by law, and that the law has prescribed in advance what they are to do, and how they are to do it.

It is submitted, the laws of Louisiana have not clothed the city officials, with the attributes, the mandate must assume they possess. The tax directly involved here is of great magnitude. The judicial implication in favor of the tax, recognized in the opinion, will in its general

application carry taxation, amounting it is believed, to millions of dollars. Is it reasonable to suppose that the legislature ever intended the municipal governments, should exercise the taxing power, to so large an extent, on an implication derived from legislation, permitting the creation of municipal obligations. If the taxing power is to be applied to pay such obligations, there are questions arising in the imposition and collection of the taxes, which it is not reasonable to suppose the legislature even intended to remit exclusively to the municipal authorities. The power of taxation unquestionably may be delegated. It is through municipal government, it is to a large extent exerted. But it is rarely delegated, without strict limitations. Certainly, in Louisiana, the legislature has not delegated to the corporation the power of special taxation of the character involved, here, in the sense of an unlimited control of the city authorities, over the subjects of taxation, the rate to be imposed, and all other incidents coming within the exercise of the power.

The constitution of Louisiana confers on the legislature, it is maintained by the decision of the Supreme Court of the State, the power of discriminating between the objects of taxation. See Constitutions of Louisiana 1845, 1852, 1868, articles 127, 123, 118. State vs. Popdras, 9th Louisiana Annual, p. 165. In respect to municipal taxation for railroad purposes, and objects out of the range of municipal administration, the legislature has uniformly controlled taxation in all important respects, although subject to that control, the power has been delegated. Thus in 1852, the legislature directed the levy of a tax by the city on *real estate* and *slaves*, (exempting personal estate) to pay the old city debt and the debts of the previously existing municipalities. Acts 1852, p. 53, § 37. In 1854, the legislature authorized the city to tax for the interest on the railroad and other bonds, continuing the exemption of personal estate, directed the tax to be levied on real estate and slaves. Act 1854, pp. 69–72. The general law of 1852 above alluded to, authorized taxation for works of internal improvement on certain conditions, to be levied on the landed estate alone. See Acts 1852, p. 128. That being the Act under the authority of which the first tax proposed in aid of the railroads was granted,

but afterwards repealed in the law under which the bonds issued.

The later legislation authorizes taxation for interest only on the bonds and for ordinary corporate purposes, to be levied upon all real and personal estate, but under strict limitations as to rate, etc., of the nature expressed in the Act of 1856, in these words, contained in the section after prescribing the tax and its rate:

SEC. 42. *Be it further enacted, &c.*, That the Common Council of the city of New Orleans shall, for the purposes of this act, once, and not oftener, in each and every year, lay an equal and uniform tax upon all property, real and personal, in said city; but said tax, added to the Consolidated Loan tax, and to the Special tax for payment of the annual interest on the bonds issued by the city for subscriptions to the stocks of the New Orleans, Opelousas, and Great Western Railroad Company, the New Orleans, Jackson, and Great Western Railroad Company, and the Pontchartrain Railroad Company, shall not in the aggregate be more than one dollar and fifty cents on one hundred dollars of valuation, except in case of invasion or insurrection: Provided it be sufficient to pay the interest on the consolidated debts and railroad bonds issued by the city of New Orleans.

Similar limitations occur in all the subsequent legislation. Acts Legislature of Louisiana, 1870, p. 37, par. 20. Acts 1872, p. 127, § 15, down to the Premium Bond Act of 1876, which prohibited all taxation except for the bonds provided by that Act. Act 1876, p. 31. Now all this legislation manifests the invincible aversion of the legislature to clothe the city of New Orleans with that plenary power over the adjustment and regulation of taxation, which the issuing of the mandate, if it issues, must imply to have been conferred. There is no such implied or express power in the city: its absence and its prohibition is apparent in every line of the legislation of the State. To hold that the municipal authorities have an implied power to adjust and levy a tax to pay railroad bonds, on the ground that the legislature has authorized the bonds to issue, invests the city with functions in respect to taxation which on any survey of the actual legislation of the State, must b

deemed, not to be possessed by the city official, but prohibited. To perform the functions enjoined by the mandate of this Court, if it issues, the city authorities will have no guide but the judicial direction and the analogy they may deem furnished by the laws directing taxation for other purposes.

How are they, the city officials, to act in respect to the adjustment of the tax? The Railroad Aid Act of 1852, and the repealed ordinance of 1852, from neither of which is the tax here susceptible of being derived, selected landed estate only to sustain the tax. The law of 1854, directing the tax for the interest on the bonds, designated lands and slaves to bear the burden. The later legislation of 1856, and subsequent years, directed the tax for ordinary corporate purposes and for interest on the bonds only to be levied upon real estate, slaves and personal property, and under the restrictions and only for the purposes enumerated in the act. If any rule of taxation, given by express legislation for other purposes, is followed in adjusting this tax, it can only be deemed a rule furnished by analogy; the exercise of discretion by the authorities, but none the less a discretion, required of them by the mandate of this Court.

It may be that urgent considerations demand that one or the other species of property, should be exempted from any additional burden. Had the legislative will been manifested in regard to taxation for the principal of these bonds, it might have been deemed proper to place the tax on real estate alone, following the precedent of the repealed tax ordinance of 1852, and the interest tax of 1854, both levied on that species of property. But on the theory of a tax by implication, arising merely from the legislative authority to confer the debt, these considerations with reference to the objects of taxation are not to be weighed and their influence settled by the legislature, but under the mandate of this Court, that the tax is to be levied, the subject is committed to the officers of the city.

The limited power of taxation vested in the city being exhibited, this is not the case where the legislative authority to contract the debt, is allied to a pre-existing power of taxation vested in the corporation adequate to cover special taxation. Thus in the case cited in the opinion (37 Penn., p. 277), the power seems to have been vested in the corporation to make

annual assessments for county purposes—and this, coupled with the legislative permission to incur the debt, seems to have controlled the reasoning of the Court in that case in reaching the conclusion that the right to the tax was incidental to the creation of the debt. But the city of New Orleans had no such general power, when the issue of the bonds were authorized. To imply the tax under any circumstances, merely because the legislature confers authority to contract the debt, it is respectfully submitted, labors under the difficulties already urged, but least of all, can such an implication be indulged, in view of the legislation in this State, which does not place taxation for railroads or other special purposes within the functions or powers of the city authorities, but witholds such control.

In marked contrast with this implied right of taxation, which the Court maintains it is authorized to deduce from the legislative authority to contract the debt, are the decisions of this Court in previous cases. The Court has hitherto sought the tax only in the statutes of the State expressly authorizing the tax claimed. In the first case, Commissioners of Knox County vs. Aspinwall, the mandamus was issued to compel the levy of the tax because it was made the duty of the County Commissioners, by the Act of the Assembly of Indiana, to assess the special tax claimed in that suit (24th Howard, p. 383). In Van Hoffman vs. the City of Quincy, the mandamus was granted, because, observed the Court, "it was part of the case before us, that when the bonds were issued there were statutes in Illinois which authorized the levying of a special tax to pay the bonds" (4 Wall. 549). In Riggs vs. Johnson County, the right to the mandamus was recognized because of the State statute which made it obligatory on the county officers to levy the tax (6 Wall., p. 166). In Supervisors vs. Rogers, the mandamus was based upon the statute of the State, in which the duty of levying the tax upon the taxable property "was specially enjoined on the Board of Supervisors" (7th Wall., p. 180, and others might be cited).

But this is believed to be the first case in which, instead of the express direction of the legislature directing the levy of the tax, the Court founds the right to the tax upon an implication already sufficiently discussed, and which, it is submitted, can-

not be accepted as an equivalent for that basis, upon which the previous decision in this class of cases has rested.

But if the tax can be implied from the Act, authorizing the creation of the debt, the implication must at least be reasonable, and not in conflict with the Act, and this the Court affirms.

This Court in its opinion, maintains that the legislature in pledging the stock for the payment of the bonds, merely gave an auxilliary security, not exclusive of taxation. If the legislature designed the stock, as full and exclusive provision for payment, it certainly is fatal to the supposed implication in favor of taxation. The implication against any tax for the principal of the bonds, arising from the special provision, derives a strength from considerations to which the attention of the Court is invited.

The legislative view in respect to the adequacy of the provision made for the bonds in 1854, is not, we submit, to be measured by the result of that provision. It is now demonstrated, that the provision was abortive. The stock in fact depreciated, and then was diverted from the redemption of the bonds to which it was pledged, in good faith by the legisture of 1854. But do these actual results, serve in any manner to illustrate the intention of the legislature, in respect to taxation for these bonds. Irrespective of what has become of the stock pledged for these bonds in 1854, the question now is whether scanning this legislation of 1854, any legislative purpose to grant a tax under any circumstances for the principal of these bonds can be discovered—and beyond that is there not a manifest, through implied prohibition in the Act, directed against such taxation. The solution of this question is not at all aided by the result of the provision made 25 years ago. The result unquestionably proves, the legislature was mistaken, as to the adequacy of the provision. But if the legislature of 1854, purposely pledged the stock, to the manifest exclusion of taxation, their will must prevail in the issue involved here, and the tax must be denied.

Now in this case, the taxation provided for by the ordinance of 1852, was abandoned. The scheme of aid to the railroad by issuing bonds, pledging stock for their payment, an

giving a tax for interest only, was substituted. This legislation: the abandonment of the taxation of 1852: the substitution of bonds: the giving of an interest tax only: the other provisions for the redemption of the bonds; surely all this does not readily suggest that the legislature designed taxation to pay the bonds. The implication that taxation was intended, certainly finds no sure basis in this legislation of 1854, and the circumstances under which it was framed. But to go a step further. The Court finds confirmation, that the legislature of 1854 did intend taxation to pay the bonds, because the stock it pledged for the bonds was unsaleable. The reasoning of the Court is, that as the stock was unsaleable and the legislature knew it, it is irrational to hold that the legislature intended to pledge unsaleable stock only to pay the bonds, and to withold taxation. But it must occur that if the legislature deemed the stock valueless, why pledge it as collateral security. The road was at its beginning. The stock in future enterprises might be unsaleable, but its future value might, none the less, have been highly estimated. The bonds had twenty years to run. In estimating the legislative intention in pledging this stock in 1854, the best test is the legislative appreciation at that time, of the future value of this stock. The Act answers this question. The legislative contemplation was that the stock would prove of greater value that the amount of the bonds. Dividends on the stock were anticipated; and it was thought that the dividends would exceed the annual interest on the bonds and supply a sinking fund for the bonds. This legislative appreciation is expressed in the act. The legislature then did not treat the stock as valueless, on the contray they esteemed it of great value. The reasoning that the legislature could not have deemed the stock adequate provision for the bonds, thus finds its answer in the Act. If with the appreciation shown by the Act, of the value of the stock, the legislature made the pledge intending it to be full provisions, and not intending taxation to be resorted to, that intention if plainly manifested, is the test of the right to taxation, when the assistance of the Court is invoked by the bondholder.

In 1854, too, it was a rule of legislation, not obligatory upon the legislature it is true, that whenever a corporate debt was incurred, the *full* provision for its payment, in principal and interest, should be set forth in the ordinance. The legislature of 1854 might have left the means of payment to be implied from some source not expressed in the Act. But the fact that in this case the legislature has complied with the rule of legislation referred to, to which much importance was attached and with which the people and the legislature were familiar, certainly gives a significance to this Act of 1854 against the tax here claimed, which the mind finds it difficult to resist. This ground is well stated in the opinion.

It is respectfully submitted, that the right to the tax is an issue arising after judgment on the bond. The validity of the bond, and the right to the tax to procure satisfaction of the judgment, are distinct propositions. The recovery of the judgment on the bond, is first required. Then, if an ordinary execution proves unavailing, a mandamus will issue, provided the law in force when the bond issued, confers the tax. But the judgment on the bond cannot be deemed, to settle or conclude the right to the tax. The mandamus to compel the levy of a tax, is a mode of executing judgments. The right to that relief is to be tested irrespective of the judgment, and by the laws of the State respecting taxation. See 19 Wallace, p. 657; 5th Wallace, p. 708; 4th Wallace, p. 535.

The jurisprudence established by this Court that the laws in force when the debt is created, authorizing taxation for the debt, enter into the contract and cannot be impaired by subsequent legislation, postpones the more special examination of that subsequent legislation, until that existing at the time, the bonds is sued is exhibited. But if it has been demonstrated, that the bonds issued in 1854, were entitled to no taxation, either by the laws antecedent to their issue, existing at that date, or by the law itself under which the bonds issued, it is now appropriate to call the attention of the Court, more particularly to

the absolute prohibition of the tax here claimed, contained in the legislation applicable to the city, since 1854. The Acts of 1856, already noticed limited taxation, prescribed the purposes for which taxes should be levied, and excluded all other purposes. The principal of these bonds was necessarily excluded.

Again, in 1870 the legislature authorized the city to levy an equal and uniform tax for the purposes of this Act, upon all property, real and personal, in said city, under assessments thereof, to be made in the manner said Council shall prescribe, and to provide for its collection; but said tax, added to the consolidated loan tax and to the special tax, for the payment of the annual interest on the bonds issued by the city for subscription to the stocks of the New Orleans, Opelousas and Great Western Railroad Company, the New Orleans, Jackson and Great Northern Railroad Company, and the Pontchartrain Railroad Company, and the interest on the ten per cent. bonds, and the interest on seven per cent. bonds issued by the city of New Orleans, shall not, in the aggregate, be more than one dollar and seventy-five cents on the one hundred dollars of valuation annually, except in case of invasion or insurrection; provided it be sufficient to pay the interest on the consolidated debt and railroad bonds issued by the city of New Orleans; and also for the purposes of this Act, to levy, impose and collect a license tax upon all persons pursuing any trade, profession or calling, and to provide for its collection; and said license tax shall not be construed to be a tax on property.

In 1872, the legislature enacted, that the Council, after the adoption of the estimate, shall proceed to levy the annual taxes required, to-wit:

First—The city debt tax, which shall be based upon the detailed estimate of the sinking funds and interest falling due. For all bonds for which no other retiring provision exists by law, an estimate shall be included of not less than two nor more than ten per cent. of the face of the bonds outstanding of any of the several issues, which shall be applied to the retiring of bonds offered at the most advantageous rates, no bid to be accepted higher than par, and the right reserved to reject all bids. No limit other than herein laid down shall

apply to this tax, which is hereby declared a vested right of the bondholders interested.

Second—A tax for current city expenses, including police and exclusive of interest and schools. This tax shall in no year exceed one and a quarter per cent. upon the assessed value of real, personal and mixed property.

This legislation of 1872 recognizes that no tax for the principal of these bonds is authorized. The bonds involved here matured in 1874. This must be deemed to have entered into the legislation contemplated in 1872, for it authorized, as will be seen in the section quoted, a limited tax for bonds for which no retiring provision is made by law, But this limited provision for such bonds made by the Act of 1872, was repealed by the Act of 1876, and as the legislative power is supreme over laws passed after the issue of the bonds, it was competent for the legislature to take away in 1876 what it granted in 1872. The contract of the bondholder embraces only the laws in force when the bonds issued. 4th Wall. 555.

In 1870, the legislature passed an act prohibiting the issue of any writ of fi. fa. against the city or writ of mandamus against the city to compel the payment of any judgment. The act directed that the judgment should be registered in the office of the Controller of the city, and if there should be money set apart in the annual budget to pay such judgment, it was made his duty to warrant on the Treasurer for its payment, but if there was no money set apart, the act made this provision:

SEC. 3. *Be it further enacted, etc.*, That in case the amount of money designated in the annual budget for the payment of judgments against the city of New Orleans at the date when any judgment against the said corporation shall have been final and executory shall have been exhausted, the Common Council *shall have power, if they deem it proper*, to appropriate from the money set apart in the budget or annual estimate for contingent expenses, a sufficient sum of money to pay said judgment or judgments, but if no such appropriation be made by the Common Council, then all judgments shall be paid in the order in which they shall be filed and registered in the office of the

Controller from the first money next annually set apart for that purpose.

SEC. 4. *Be it further enacted, etc.,* That if, by reason of the failure of the Controller or the auditing officer of the city of New Orleans, or of the Treasurer or disbusring officer of said corporation to perform his duty, or if, by reason of the neglect or malfeasance of them, or either of them, any person, persons, corporation or corporations, shall be unjustly delayed in the payment of any judgment or demand against the city of New Orleans, or shall not be paid in their due and regular order in which such demands are entitled to be paid, and shall be prejudiced and suffer loss and damage thereby, or by reason of any unjust preference to other creditors, such person, persons, corporation or corporations so injured by the act of either of said officers, shall have a right of action against such officer or officers individually, by whose act or acts he or they have suffered loss and damage, and against the surety or sureties on the official bond of such officer and may recover damages therefor against said officer and sureties for such amount as they may establish on the trial of such cause.

This act has been maintained by the Supreme Court of the State.

See State ex rel., Strauss vs. Brown, 30 An., p. 79.

In 1876 the legislature prohibited any and all taxation for all bonds, except the taxation for the premium bonds provided for by that act, which were to be exchanged for all outstanding bonds. The provisions in the Act of 1876, prohibiting taxation and other important provisions are as follows:

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened,* That the Mayor and Administrators of the city of New Orleans, or such other officers, aldermen or administrators as may hereafter be ordained and established, be and they are hereby authorized and directed to exchange all recognized and valid bonds of the city of New Orleans and the late cities of Jefferson and Carrollton for bonds known as the premium bonds of the city of New Orleans, in accordance with the plan adopted by the City Council, and approved by the

Mayor on the twenty-fifth May and thirty-first August, 1875 The said premium bonds shall be dated the first of September, 1875, and bear interest at the rate of five per cent. per annum, from the fifteenth of July, 1875; they shall be signed by the Mayor, the Administrator of Finance, and the Administrator of Public Accounts, as commissioners of the consolidated debt and countersigned, when issued, by such parties as the Council have designated heretofore, or may hereafter designate, with the authorization of the supervising committee hereafter named.

SEC. 6. *Be it further enacted, etc.*, That it shall be the duty of the City Council, in the month of December of each year, or in the annual budget annually adopted for the ensuing year, to include an amount sufficient to meet and pay the principal and interest of the premium bonds, together with premium included, in the several allotments of series and premiums fixed for such year by the aforesaid ordinances and this act. It shall be the duty of the Council annually to levy an equal and uniform tax on all the assessed property within the corporate limits of the city, at a rate sufficient to provide the amount included in the budget as aforesaid, and said tax so levied shall constitute a special fund to be used for no other purpose than the payment of said bonds and interest on the said premiums comprised in said allotment, and the funds so raised shall be placed to the credit of an account to be called the premium bond account, and no money from said fund shall be paid out except on the joint authority of the commissioners of the consolidated debt. The said tax so to be raised shall be denominated the premium bond tax, and shall be separately mentioned in the tax rolls and receipts: *provided*, that the taxable power of the corporation of the City of New Orleans for all purposes, including general administration, school, police, lighting, salary of officers, court expenses, and every other purpose of government, including the sum to be raised to pay the premium bonds, as above stated, shall never, until the full, complete and final payment of the said premium bonds, exceed the rate of one and one-half per centum on the dollar of all the assessed value of property subject

to taxation within the limits of the said city of New Orleans. The above limitation of the taxable power of the corporation is hereby declared to be a contract, not only with the holder of the said premium bonds, but also with all residents and taxpayers of the said city, so as to authorize any holder of said premium bonds, resident or taxpayer, to legally object to any rate of taxation in excess of the rate herein limited. It being also a part of the consideration of this contract that the city of New Orleans shall be incompetent to incur any debt or obligation, as now provided by the constitution of this State, until the final payment and extinction of the premium bonds aforesaid.

SEC. 7. *Be it further enacted etc.*, That no tax for the payment of bonds or interest on bonds other than that authorized by the preceding sections, shall be levied either for the year 1876, or any year or years thereafter by the city of New Orleans, and that all existing laws requiring or authorizing the City Council to levy any tax whatsoever for bonds or interest on bonds, other than said premium bonds, be and the same are hereby repealed; and it shall be hereafter incompetent for any court to mandamus the officers of said city to levy and collect any interest tax other than that provided in this act, or in case of such mandamus, by a receiver or otherwise, to direct the levy and collection on any such tax.

If the bondholder here had no tax for the principal of his bond granted to him in 1854, he in common with all the other public creditors in like condition, were applicants for such legislative provisions as might be made for him. 19 Wall., p. 660. If he had a vested right to any tax, by the laws in force when his bond issued, under the jurisprudence established by the Court, the legislative provisions made for the bondholders by the later legislation, could not be forced on him. But if he had no such vested right, the legislative prohibitions contained in all this legislation, especially the Act of 1876, are operative against the bondholder and concludes him from relief. The legislature cannot abridge or take away laws of taxation in force when the bond issued, but with that restriction the public creditor must abide the legislative provisions. The

legislation of 1856, of 1870, of 1872 and 1876, is conspicuous for its absolute prohibition of the tax claimed here.

It is submitted that these bonds stood deprived by the legislative will of any tax for their payment when they were issued, and the tax now sought to be enforced, is also met by the absolute prohibitions in the subsequent legislation.

A rehearing in this case is most respectfully asked for.

B. F. JONAS,
HENRY C. MILLER,
Of Counsel for the City.